



## **Alliance for Justice Report on Elena Kagan**

### *Executive Summary*

On May 10, 2010, President Obama nominated Elena Kagan to the Supreme Court. If confirmed, she will be the fourth woman to serve on the Court and, for the first time three women will sit together.

Kagan is the Solicitor General of the United States and the former Dean of Harvard Law School. She has excelled at every stage of her education and career. Her intellect and qualifications have been applauded across the political spectrum. Elena Kagan is often praised for her ability to build coalitions among persons of diverse opinions and ideologies. Many of her supporters point to her successful tenure as Dean of Harvard Law School as evidence of that trait. She was named Dean during a contentious time in the school's history and is widely credited with breaking a logjam over faculty hiring and bringing in conservative scholars to address criticism that the faculty was too ideologically unbalanced.

Her record presents itself differently from other nominations. We know less about her views on the major issues that she will confront on the Court than we have known about most nominees. Her academic writings are limited, focusing primarily on the First Amendment and administrative law. She has not written in law reviews or more popular venues about many of the leading legal or political issues of the day, nor has she directly stated a personal adherence to a particular judicial philosophy or theory of statutory and constitutional interpretation. Her speeches rarely stake out positions on controversial issues. If confirmed, she will join a Court consisting entirely of former appellate judges, bringing a diversity of professional experience that has historically been a part of the Court. However, the lack of a judicial record to consult poses a different challenge when trying to ascertain her views.

Kagan has held important positions in public service in which she addressed significant issues. In each position, however, she was required to operate according to certain institutional constraints that make it difficult to isolate her personal views. As a law clerk to Justice Thurgood Marshall, she was required to channel his judicial philosophy to help identify cases that he thought the Court should hear and to help him analyze cases that came before the Court. As a lawyer in the White House Counsel's Office and as Deputy Director of the Domestic Policy Council, her role was to serve President Clinton by advancing his views. The role of the Solicitor General is to promote the interests of the United States through litigation and, whenever there is a reasonable

basis for doing so, to defend the laws and actions of her client, regardless of her personal views.

Nevertheless, her record is not devoid of hints as to how she will address issues, and this report attempts to identify those indications. Committed to ensuring transparency in Kagan's confirmation process, the White House, together with the William Jefferson Clinton Presidential Library & Museum, has released over 160,000 pages of presidential records relating to Kagan's service in the Clinton White House. Alliance for Justice has reviewed the vast majority of these records, as well as Supreme Court briefs, transcripts, and decisions relevant to her tenure as Solicitor General. This report synthesizes key issues revealed in Kagan's record with an emphasis on her role in the Clinton White House and as Solicitor General under President Obama in an attempt to glean any possible conclusions that can be drawn regarding her stances on constitutional, legal, political, and social issues that deeply impact the lives of all Americans.

An effort to gauge what sort of Justice Kagan might be is extremely important because she will fill the seat currently occupied by Justice John Paul Stevens, who has become a champion of the Constitution at a time when many of our most fundamental values have been under attack by a narrow, conservative majority. Justice Stevens has emerged in the past decade as the Court's most powerful and eloquent voice for individual liberties, separation of powers, and equal access to justice. He has forged coalitions, cultivating Justices to join him in defending civil rights, environmental protections, and judicial oversight of executive power. In dissent, he has written more frequently and more boldly than other Justices, clearly articulating and defending core constitutional values. Upon his retirement, the Supreme Court—and the country—will lose one of its strongest voices in support of constitutional protections.

We see in Elena Kagan's record the ability to step up to embrace Justice Stevens's legacy. Plainly, she has the intellectual tools for the job. She has also demonstrated the ability to function well in demanding institutional settings. She worked effectively in the White House, the Department of Justice, and Harvard Law School. And she has served in administrations committed to progressive values. All of these qualities bode well for her future on the Court.

We believe her elevation to the Court will give her the freedom to articulate her vision and become a powerful voice in defense of our core constitutional values. President Obama has spoken of the need for Justices who understand the plight of all Americans and for courts that serve as the great levelers in American society. Our courts can and must provide a forum in which a single person can confront the powerful and prevail. They must apply the law fearlessly to provide remedies for individuals who are left out by the vagaries of our democracy and individuals who are harmed by the actions of powerful interests. Too often in recent years, the Court has gone out of its way to disregard Congress and precedent to favor corporate and monied interests over consumers, workers, and the less powerful members of our society. Justice Stevens fought this activist trend of the Roberts Court. Elena Kagan has the opportunity to stand against this tide. On balance, what we have seen in her record bolsters our hope that she

will develop into a Justice who will put her remarkable intellect, legal acumen, and skills of persuasion to good use in the service of justice.

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## I. CAREER OVERVIEW

Elena Kagan has an impressive academic and professional background. She graduated *summa cum laude* from Princeton University, received her Master of Philosophy from Oxford, and obtained her J.D. *magna cum laude* from Harvard Law School, where she was the supervising editor of the Harvard Law Review and worked as a research assistant for Professor Laurence Tribe. After law school, she clerked for Judge Abner Mikva of the U.S. Court of Appeals for the District of Columbia and for Supreme Court Justice Thurgood Marshall. Following her clerkships, she worked as a staff member in 1988 on the Dukakis for President Campaign and then entered private practice from 1989-1991 as an associate at Williams & Connolly, LLP. In 1991, she moved to academia as a professor at the University of Chicago School of Law, obtaining tenure in 1995. While teaching at the University of Chicago, she focused on administrative law and First Amendment issues. She also took on a special assignment as senior counsel to then-Senator Joe Biden (D-DE), who was chairing the Senate Judiciary Committee's Supreme Court confirmation hearings for Ruth Bader Ginsburg.

Between 1995 and 1999 Kagan served in the Clinton Administration in two roles. She was Associate White House Counsel from 1995-1996 and Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council from 1997-1999. While serving in the White House Counsel's Office, Kagan worked extensively with the Department of Justice to consider how the United States would take action on significant or potentially controversial legal cases; provided legal analysis for the President on law reform initiatives, criminal justice policy, and a broad spectrum of legislative and policy initiatives; monitored the correct degree of contact between the Administration and Executive Branch agencies; and managed aspects of congressional investigations of the Administration. In the words of White House Counsel Jack Quinn in a 1996 memo describing the mission statement of the Counsel's Office, "[i]n performing all of these functions, the Counsel's Office attempts to combine rigorous legal advocacy with finely-tuned political judgment."<sup>1</sup> As part of the Domestic Policy Council, Kagan advised the President; helped coordinate and execute the White House's domestic policy initiatives; worked with Congress to further the President's legislative priorities; analyzed legislative language for legal effect and force; and negotiated opposition to White House initiatives.

Kagan's White House years speak to her ability to reach across political and ideological divides and produce results. Bruce Reed, Kagan's boss on the Domestic Policy Council, said that he relied on her for White House briefings because she is "a superb consensus-builder."<sup>2</sup> It is important to remember while analyzing Kagan's record during the Clinton Administration that she reported to others and ultimately strove to advance the policies advocated by President Clinton, making it difficult to separate her policy views from those of her superiors.

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<sup>1</sup> Memorandum from Jack Quinn to Erskine Bowles (Nov. 22, 1996), William J. Clinton Presidential Library & Museum, E-mail Composed, Box E011, Folder 005, 77.

<sup>2</sup> Eric Lichtblau, *Potential Justice's Appeal May Be Too Bipartisan*, N.Y. TIMES, May 16, 2009.

In 1999, President Clinton nominated Kagan to a seat on the U.S. Court of Appeals for the District of Columbia, but the Senate Judiciary Committee, chaired by Orrin Hatch, never scheduled a hearing for her. Later that year, she became a visiting professor at Harvard Law School.<sup>3</sup> Rising quickly through the ranks, in 2003 Kagan was named the law school's first female dean. As Dean, she oversaw a \$476 million capital fundraising campaign and revamped the school's core curriculum. She also continued Harvard's longstanding policy barring military recruiters from on-campus hiring programs on the basis that Don't Ask, Don't Tell violates the University's non-discrimination policy, and, somewhat controversially, she became a vocal critic of the Solomon Amendment, which strips higher education institutions of federal funding if they bar military recruiters from campus (see further discussion below in Section IV, "Civil Rights").

Since March 2009, Kagan 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.<sup>4</sup> 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. It is incumbent upon the Solicitor General to defend the government as 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."<sup>5</sup>

While not all of the positions that Kagan took during her time in the Clinton and Obama Administrations can be attributed to her personally, a review of her record reveals some trends and may offer insight into her legal, social, and constitutional views.

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<sup>3</sup> Some have pointed out, however, that of the 32 tenure-track faculty hired during her tenure, none was African American or Latino and only seven were women. The sole minority hire was an Asian American female.

<sup>4</sup> 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).

<sup>5</sup> Robert Barnes, *In Elena Kagan's Work as Solicitor General, Few Clues to Her Views*, WASHINGTON POST, May 13, 2010.

## II. FIRST AMENDMENT

Much of Kagan's professional work and academic writings has centered on the First Amendment. Out of the six cases she has argued before the Supreme Court as Solicitor General, three have centered on the First Amendment, including the landmark case of *Citizens United v. Federal Election Commission*.<sup>6</sup> Kagan's White House portfolio included significant work on campaign finance reform legislation and religious liberty issues, both of which provide rare insight into her views on hard constitutional questions. It appears from her White House records that she was extensively involved in White House efforts to develop campaign finance regulations, many of which were incorporated into the Bipartisan Campaign Finance Reform Act (BCRA) of 2002 (known as the McCain-Feingold Act).<sup>7</sup> Most notably, the Clinton records reveal that Kagan has expressed strong disagreement with the Supreme Court's line of decisions equating money spent during elections with constitutionally protected speech.

### Campaign Finance Reform

During several phases of her career, Kagan has grappled with the complicated constitutional issue of First Amendment constraints on campaign finance reform. In her first appearance before the Supreme Court, Kagan argued *Citizens United v. Federal Election Commission*, defending the McCain-Feingold Act's restriction on corporate expenditures during election cycles. While the case had already been briefed and argued before Kagan became Solicitor General on fairly narrow grounds, the Court, in a highly unorthodox move, invited reargument on a new issue: whether its prior decisions upholding restrictions on corporate electioneering should be overturned. Kagan emphasized that for over one hundred years, the Supreme Court left campaign finance laws undisturbed, despite having numerous 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. In a 5-4 decision, the Court rejected Kagan's argument, overturning two Supreme Court decisions, undermining one hundred years of precedent, and opening the floodgates to corporate spending in elections.

Notably, she made the tactical decision at oral argument to abandon the rationale that corporate election spending would distort the marketplace of ideas and drown out the speech of individuals—a rationale which the Supreme Court had ruled in *Austin v. Michigan State Chamber of Commerce* was a compelling government interest in regulating election-related speech.<sup>8</sup> Instead, she 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. Some scholars have speculated that Kagan's decision in *Citizens United* not to rely on the speech market equalization rationale flows from her 1990s First Amendment scholarship and may indicate that she does not believe the government can correct the distortion in speech markets.<sup>9</sup>

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<sup>6</sup> *Citizens United v. Federal Elections Commission*, 130 S. Ct. 876 (2010).

<sup>7</sup> Pub. L. No. 107-155, 166 Stat. 81 (2002).

<sup>8</sup> 494 U.S. 652 (1990).

<sup>9</sup> See, e.g., Marvin Ammori, *Citizens United: Does Elena Kagan Disagree with Barack Obama on Corporate Speech?*, BALKINIZATION (May 9, 2010), <http://balkin.blogspot.com>; Marvin Ammori, *Elena*

In her article *Private Speech, Public Purpose*, Kagan suggested that the anti-distortion rationale may “conflict[] with fundamental premises of the First Amendment.”<sup>10</sup>

However, her White House records about campaign finance reform initiatives indicate that her vision of the First Amendment departs significantly from the recent Supreme Court trend to equate money with speech and deem campaign finance regulations incompatible with the First Amendment. In an undated note to Jack Quinn considering possible constitutional challenges to the White House’s proposed ban on non-citizen involvement in federal elections, she drafted talking points that said:

**It is unfortunately true that almost any meaningful campaign finance reform proposal raises serious 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 concerns. . . . 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.** (emphasis added).<sup>11</sup>

Another memo reveals an articulation of First Amendment values in the context of campaign finance reform that diverges sharply from recent Supreme Court jurisprudence. In a memo about laws providing public financing to candidates whose opponents spend large amount of money, Kagan rejected the notion that such public financing schemes “chill” the opponents’ speech. She wrote “this is not a penalty on the speaker who wants to talk too much. It’s a benefit—like many we give—to people who agree to comply with the limits.”<sup>12</sup> This approach directly contravenes the Supreme Court’s 2008 ruling in *Davis v. Federal Elections Commission*, a 5-4 decision written by Justice Alito striking down the so-called “Millionaire’s Amendment” to McCain-Feingold.<sup>13</sup> The “Millionaire’s Amendment” raised the individual contribution limits to candidates whose opponents spent more than \$350,000 of their own funds on their campaign; the Court ruled that this provision chilled the First Amendment speech rights of the self-funded candidates.<sup>14</sup> Kagan’s memo also suggests conflict with the Supreme Court’s June 2010 unsigned order reinstating an injunction prohibiting Arizona from

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*Kagan and Anti-Distortion of the Speech Market*, BALKINIZATION (May 24, 2010), <http://balkin.blogspot.com>.

<sup>10</sup> Elena Kagan, *Private Speech, Public Purpose*, 63 U. CHI. L. REV. 413, 467 (1996).

<sup>11</sup> Personal Note from Elena Kagan to Jack Quinn (undated), William J. Clinton Presidential Library & Museum, Office of White House Counsel [hereinafter WHC], Box C35, Folder 004, 40.

<sup>12</sup> Personal Note from Elena Kagan to Randy and Neil (undated), William J. Clinton Presidential Library & Museum, WHC Box C34, Folder C04, 105.

<sup>13</sup> 128 S. Ct. 2759 (2008).

<sup>14</sup> 2 U.S.C. § 441a-1(a) (2002), *invalidated by Davis v. FEC*, 128 S. Ct. 2759 (2008).

enforcing its public financing law, which allows publicly financed candidates to receive additional matching funds when their opponents spend more than a threshold amount.<sup>15</sup>

Personal views aside, her White House files reflect a nuanced understanding of and respect for constitutional limits on proposed campaign finance reforms. The files also show that her ultimate goal throughout the campaign finance policy discussions was always to figure out how to argue that certain proposed reforms fit within the existing constitutional framework and secure a bill's passage. For example, responding to a suggestion of working to develop "constitutionally valid" proposals to limit independent expenditures, she wrote, "I doubt such proposals exist, and I am wary of touting this notion to the President."<sup>16</sup> In another memo she wrote: "I think it's pretty clear that the ban on non-citizen contributions is unconstitutional (though, a ban on foreign contributions would not be)... If the decision is to go ahead with the proposal, I recommend including something like the attached in the materials being prepared to explain the proposal."<sup>17</sup> Kagan also expressed concern that prohibitions on bundling of campaign contributions were constitutionally problematic, and that Democrats would likely offer amendments to cure them. She nonetheless warned, however, against accepting the Democratic fixes to the bill as this would appear to be politically motivated and would "cost the President the credit he received for supporting [a reform bill]." In another instance she appears to have worked to stop the Office of Legal Counsel (OLC) from publicly challenging the constitutionality of particular provisions in the draft bill.<sup>18</sup>

## Free Speech

In another First Amendment case, 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.<sup>19</sup> 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.<sup>20</sup>

## Establishment & Free Exercise Clauses

It is difficult to discern Kagan's views on the religion clauses, as she has taken different positions on the Establishment and Free Exercise Clauses over the years. In

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<sup>15</sup> *McComish v. Bennett*, No. 09A1163, 2010 WL 2265319 (U.S. June 8, 2010) (order temporarily vacating stay of District Court's injunction).

<sup>16</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Nov. 14, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C35, Folder 004, 19.

<sup>17</sup> Personal Note from Elena Kagan to Jack Quinn (undated), William J. Clinton Presidential Library & Museum, WHC, Box C35, Folder 004, 39.

<sup>18</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (July 17, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C34, Folder 004, 11.

<sup>19</sup> 130 S. Ct. 1577 (2010).

<sup>20</sup> *Id.*

1987, then-clerk Kagan wrote in a memorandum to Justice Marshall<sup>21</sup> about the case *Bowen v. Kendrick*, in which she argued that federal grants to religious organizations under the Adolescent Family Life Act<sup>22</sup> violated the Establishment Clause of the First Amendment. A group of clergy and the American Jewish Congress challenged the constitutionality of the Act, arguing that a provision of the Act that required pilot projects seeking federal grants for teen pregnancy prevention programs to demonstrate how they will “involve religious and charitable” participants as well as other private organizations, was an impermissible establishment of religion. The U.S. Court of Appeals for the District of Columbia agreed, applying the *Lemon* test<sup>23</sup> and ruling that the Act would “inevitably” serve to advance religion and lead to “an excessive government entanglement with religion.”<sup>24</sup> Supporting the District Court’s ruling, Kagan wrote, “I think the DC got the case right. . . . 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.”<sup>25</sup> The Supreme Court ultimately ruled 5-4 to uphold the grants.<sup>26</sup> She later retracted these views, however. In response to written questions by Senator Jeff Sessions (R-AL) during her Solicitor General confirmation process, Kagan wrote, “I indeed believe that my 22-year-old analysis, written for Justice Marshall, was deeply mistaken. It seems now utterly wrong for me to say that religious organizations generally should be precluded from receiving funds for providing the kinds of services contemplated by [the Act].”<sup>27</sup>

Kagan’s White House records show that she participated in policy conversations with an eye toward respecting religious plurality and operating within the confines of the Establishment Clause. For example, Kagan expressed concerns over language in the President’s literacy campaign relating to the participation of religious organizations. A draft document dated in August 1996 explained that “[c]hurches and synagogues will also be able to use their community centers as tutoring sites so long as they accept all children . . . regardless of their religious affiliation or lack of religious affiliation.”<sup>28</sup> Citing the need to avoid potential Establishment Clause issues, Kagan reworked the language and wrote a firm note: “[p]lease do not say that ‘churches’ may participate in the program. To

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<sup>21</sup> Memorandum from Elena Kagan to Justice Marshall re: *Bowen v. Kendrick*, 87-253, 87-431, 87-462 (Oct. 22, 1987).

<sup>22</sup> 42 U.S.C. § 300Z-300Z-10 (1981).

<sup>23</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>24</sup> Memorandum from Elena Kagan to Justice Marshall re: *Bowen v. Kendrick*, 87-253, 87-431, *Kendrick v. Brown*, 87-462 3 (Oct. 22, 1987).

<sup>25</sup> *Id.* (emphasis in original). She nonetheless recommended to Marshall that the Court grant cert, saying the issue could use (although was not likely to get) clarification from the Court and that the rarity of the D.C. District Court overturning an Act of Congress on constitutional grounds merited review by the Supreme Court.

<sup>26</sup> *Bowen v. Kendrick*, 487 U.S. 589 (1988).

<sup>27</sup> *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (Elena Kagan responses to written questions submitted by Sen. Jeff Sessions (R-AL)) (emphasis in original), available at <http://judiciary.senate.gov/>.

<sup>28</sup> Memorandum from Steve Winnick to Elena Kagan (Aug. 26, 1996), William J. Clinton Library & Museum, WHC, Box C24, Folder 007, 29.

avoid any constitutional difficulties, use the term ‘religious organizations’ instead . . . . Please also do not say that parochial schools can participate in the program. Students of parochial schools can avail themselves of the benefits of the program; but there is a question, which should be avoided, whether the program can operate in or through parochial schools themselves.”<sup>29</sup> Similarly, Kagan made a brief note on an agenda of a July 1, 1998, Crime Meeting, in which she seemed to suggest altering the name of an initiative referred to as “faith-oriented anti-gang grants” to “value-based anti-gang grants,” appearing to indicate a move away from overtly religious language to a more neutral term.<sup>30</sup>

Kagan also took an active role working with the Solicitor General’s Office to prepare the government’s petition for certiorari in *Agostini v. Felton*, a case that sought to allow public school teachers to provide supplementary Title I instructional services in parochial schools.<sup>31</sup> In 1985, the Supreme Court had held in *Aguilar v. Felton* that a city program sending public school teachers to provide remedial education in parochial schools violated the Establishment Clause.<sup>32</sup> In helping prepare the *Agostini* certiorari petition, Kagan suggested that it conclude with a definite plea that the Court grant certiorari “because this is an appropriate case to reconsider *Aguilar*.”<sup>33</sup> The Court granted certiorari and, in a 5-4 decision, overturned the holding of *Aguilar*, saying that the intervening Establishment Clause jurisprudence of the Court, which had increasingly permitted taxpayer funded services in parochial schools, made *Aguilar* no longer good law.

While *Agostini* was pending, Kagan also helped with the political efforts to garner public support for the Administration’s position in the case. Kagan met with concerned lawyers from the American Federation of Teachers and the National Education Association who wanted reassurance that the government’s position in *Agostini* did not lead to the “articulat[ion of] a theory that sweeps so broadly as to suggest the constitutionality of [school] voucher programs.”<sup>34</sup> She claims in an e-mail of October 28, 1996, that she “was able to assure these groups that the brief as currently written does not pose this danger (given that it states no theory at all as to why *Aguilar* is wrongly decided).”<sup>35</sup> Kagan’s role in this dispute suggests that she favored a more permissive approach to the role of religion in schools.

Most recently, Solicitor General Kagan argued the government’s position before the Supreme Court in *Salazar v. Buono*, which she inherited from the Bush

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<sup>29</sup>Memorandum (undated), William J. Clinton Library & Museum, WHC, Box C24, Folder 007, 12.

<sup>30</sup> Crime Meeting Agenda (July 1, 1998), William J. Clinton Library & Museum, Domestic Policy Council [hereinafter DPC], Box 011, Folder 046, 13.

<sup>31</sup> *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>32</sup> *Aguilar v. Fenton*, 473 U.S. 402 (1985).

<sup>33</sup> E-mail from Elena Kagan to Jack Quinn & Kathleen Wallman (Oct. 28, 1996), E-mail Composed, Box E011, Folder 005, 39. The original draft declared “the Court should grant cert ‘if the Court agrees that this is an appropriate case’ to reconsider *Aguilar*.”

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

administration.<sup>36</sup> The plaintiff had brought a suit claiming that a Latin cross standing on federal property in the Mojave Dessert violated the Establishment Clause. The lower court held that it was unconstitutional for the cross to be displayed on federal land. Congress then enacted a land transfer so that the cross now stood on private property. One question was whether this real estate deal was a proper government response to the lower court decision. In its brief, the government argued that the plaintiff no longer had standing because he had testified that as a Catholic he did not object to crosses in general, just to crosses on government property. At oral argument, Kagan argued the standing issue, which some commentators criticized. She also argued that the government had an important non-secular interest in preserving the war memorial, and 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 to the District Court to reconsider whether it was appropriate to invalidate Congress’s transfer of the land.<sup>37</sup>

In addition to her work on Establishment Clause matters, Kagan played a large role in the Clinton Administration’s handling of Free Exercise Clause issues; by 1996, she had been given responsibility for the Administration’s religious freedom portfolio.<sup>38</sup> Early in the Clinton Administration, Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993,<sup>39</sup> a law that required the government to demonstrate a compelling interest before placing a substantial burden on an individual’s religious liberty. RFRA had strong support from both the House and Senate, from the Clinton Administration, and from of a sizeable coalition of diverse religious groups united against what they saw as increasing government burdens and infringement on religious expression. Much of Kagan’s work in the Administration dealt with the implementation of and legal challenges to RFRA; when it was overturned in a 1997 Supreme Court decision,<sup>40</sup> she continued to be involved in Administration efforts to support subsequent legislation to achieve the same goals.<sup>41</sup>

Kagan firmly supported the intent of RFRA in her legal analysis of *Smith v. Fair Employment and Housing Commission*,<sup>42</sup> a 1996 California Supreme Court case involving a landlady who, on the basis of her religious belief, refused to rent to an unmarried heterosexual couple, in violation of a state antidiscrimination law.<sup>43</sup> A plurality of the Court declared that because the landlady had the option of earning a living doing something other than renting apartments, requiring her to comply with the

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<sup>36</sup> 130 S. Ct. 1803 (2010).

<sup>37</sup> *Salazar v. Buono*, 130 S. Ct. 1803 (2010). In another odd development in the facts of this case, the cross was to remain covered pending the Court’s review, but was recently stolen.

<sup>38</sup> Memorandum from F. Whitten Peters to Elena Kagan (Aug. 26, 1996), William J. Clinton Library & Museum, WHC, Box C24, Folder 009, 2.

<sup>39</sup> 42 U.S.C. § 2000bb-4 (1993), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>40</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>41</sup> E-mail from Edward Correia to Elena Kagan, et al. (Sept. 9, 1998), William J. Clinton Library & Museum, DPC, Box 055, Folder 014, 2.

<sup>42</sup> *913 P.2d 909* (Cal. 1996).

<sup>43</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Aug. 4, 1996), William J. Clinton Library & Museum, WHC, Box C08, Folder 002, 3.

anti-discrimination housing law “did not ‘substantially burden’ her religion.” In a memo discussing the case, Kagan wrote, “The plurality’s reasoning seems to me quite outrageous—almost as if a court were to hold that a state law does not impose a substantial burden on religion because the complainant is free to move to another state. Taken seriously, this kind of reasoning could strip RFRA of any real meaning.” She expressed support for the government filing a brief on the landlady’s behalf: “given the importance of this issue to the President and the danger this decision poses to RFRA’s guarantee of religious freedom . . . I think there is an argument to be made for urging the Court to review and reverse the decision.” Years later in a memo to Ron Klain regarding an upcoming speech by the Vice-President on faith and religion, Kagan referred to herself as “the biggest fan of RFRA (now the Religious Liberty Protection Act) in this building.” Despite her support for the Act, Kagan recognized its politically polarizing effect at the time. Accordingly, she recommended to Klain that the Vice-President refrain from including it in his speech, predicting that if he comes out for it as it is, “[y]ou’ll have a gay/lesbian firestorm on your hands” and if he supports a version with “a civil rights carve-out, you’ll have a religious groups firestorm on your hands.”<sup>44</sup>

Kagan also worked on a proposed Executive Order protecting and clarifying the extent to which the law permits religious expression in the workplace. In a 1996 memo drafted while in the White House Counsel’s Office, Kagan said that although the order “recognizes constraints on such expression,” such as those implicated by the need for efficiency in the workplace and Establishment Clause restrictions, it “tries to show . . . that within these constraints, there is substantial room for discussion of religious matters.”<sup>45</sup>

She also worked with the National Campaign for a Peace Tax Fund and with members of a coalition of the historic religious “peace” organizations and denominations on possible strategies for advancing legislation to create a “peace tax”—a special tax fund for people who refused to pay their taxes because the money would, in part, support military and defense programs in violation of their religious beliefs. It appears that Kagan refuted a Treasury Department objection that a peace tax fund would create an administrative burden. In handwritten notes from a meeting on the peace tax, Kagan wrote, “Why? Lots of funds IRS manages.”<sup>46</sup> Elsewhere in the notes, she wrote “Earmarked taxes—constitutional” and seemed to be speculating on possible ways to enact such a fund.<sup>47</sup>

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<sup>44</sup> E-mail from Elena Kagan to Ron Klain (May 20, 1999), E-mail Composed, Box E009, Folder 002, 29.

<sup>45</sup> Memorandum from Elena Kagan to Bruce Reed et al. (Oct. 18, 1996), William J. Clinton Library & Museum, Staff & Office, Box S001, Folder 008, 3-4.

<sup>46</sup> Handwritten Notes (undated), William J. Clinton Library & Museum, WHC, Box C25, Folder 012, 6.

<sup>47</sup> *Id.*

### III. DUE PROCESS AND FUNDAMENTAL RIGHTS

Some insights to Kagan’s approach to constitutional questions of due process and fundamental rights can be gleaned from her White House files. In developing President Clinton’s policies for welfare reform, reproductive rights, and handgun policy, Kagan weighed in on the legal dimensions of and constitutional limits on proposed policy initiatives and legislative developments. Several memos written during her clerkship with Justice Marshall also reveal her attitude toward and interpretation of certain constitutional rights and personal freedoms.

#### Due Process

A signature initiative of President Clinton’s first term was the enactment of the 1996 Welfare Reform Act (The Personal Responsibility and Work Opportunity Reconciliation Act of 1996). The legislation significantly altered the ways in which low-income persons accessed a variety of government services, including ending welfare as an entitlement program, creating more restrictive eligibility standards, imposing lifetime caps on benefits, and allowing states to assume increased responsibility for delivering services. A significant number of documents from Kagan’s White House files concern welfare reform, and it appears that she was extensively involved in Administration efforts to negotiate, enact, and implement the legislation. Despite what appears to be Kagan’s commitment to developing and promoting Clinton’s welfare programs, Kagan has clearly expressed her belief that there is no constitutional right to welfare programs. In answering a written question during her Solicitor General confirmation process as to whether the Constitution “confers a minimum level of welfare,” she wrote that “[t]he Constitution has never been held to confer a right to a minimum level of welfare...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[.]”<sup>48</sup>

Several memos in Kagan’s White House files contain her recommendations about the constitutional implications of proposed aspects of welfare policy. In a memo Kagan sent to Jack Quinn and Kathy Wallman on June 10, 1996, she addressed the constitutionality of state regulations that imposed waiting periods on recipients of benefits.<sup>49</sup> Wisconsin imposed a 60-day waiting period for new residents applying for a “Wisconsin works” employment position. The waiting period may have been inconsistent with *Shapiro v. Thompson*,<sup>50</sup> a 1969 Supreme Court decision about the right

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<sup>48</sup> *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (Elena Kagan responses to written questions submitted by Sen. Patrick Leahy (D-VT), available at <http://judiciary.senate.gov/>).

<sup>49</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (June 19, 1998), William J. Clinton Presidential Library & Museum, WHC, Box C25, Folder 005, 54-58.

<sup>50</sup> 394 U.S. 618 (1969).

to travel which held a one-year residency requirement for obtaining welfare benefits unconstitutional.<sup>51</sup> In analyzing the constitutionality of the Wisconsin waiting period, Kagan attempted to distinguish *Shapiro* on two grounds: (1) the length of the waiting period, and (2) the difference in severity under strict scrutiny analysis. Kagan acknowledged that her reasoning was “tenuous,” but that it might succeed because of the hostility of the Rehnquist Court towards the *Shapiro* decision as “one of the worst excesses of the Warren Court.”<sup>52</sup>

In the same memo, Kagan argued that a Wisconsin regulation allowing termination of benefits without a prior hearing could be constitutional.<sup>53</sup> Kagan said the Wisconsin regulation need not meet *Goldberg v. Kelly*'s<sup>54</sup> procedural due process requirements that the Wisconsin program benefits at issue might not be considered “entitlements” for Due Process purposes because the Wisconsin Legislature “specifically disavows any creation of an entitlement on the part of welfare recipients.” Kagan summarized this argument as “pretty decent”—despite the fact that she also acknowledged the argument that “the government cannot insulate itself from due process requirements simply by labeling a given benefit as a “nonentitlement.”<sup>55</sup>

Based on her analysis, Kagan recommended that the Administration approve Wisconsin's request for a waiver, or approve the waiver under the condition that the program meet constitutional muster under *Shapiro* and *Goldberg*.<sup>56</sup> A month later, Kagan authored another memo to Jack Quinn and Bruce Reed laying out a proposal with stronger protections for eligible workers seeking employment under the Wisconsin benefit law.<sup>57</sup>

Kagan also provided counsel to the Administration on its role in a lawsuit involving procedural due process rights and Medicare benefits. In *Grijalva v. Shalala*, the Ninth Circuit held Medicare HMOs were state actors for purposes of the Fourteenth Amendment, and as such must provide written notice of hearings and denials of benefits in such a way that complied with due process.<sup>58</sup> The Department of Health and Human Services (HHS) opposed both the Ninth Circuit's imposition of new procedures and the White House's proposed Patient's Bill of Rights on the grounds that the protections were excessively burdensome and would raise medical costs. Accordingly, Medicare officials at HHS urged the Administration to file a certiorari brief opposing the Ninth Circuit

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<sup>51</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (June 19, 1998), William J. Clinton Presidential Library & Museum, WHC, Box C25, Folder 005, 54-58.

<sup>52</sup> *Id.* at 58.

<sup>53</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (June 19, 1998), William J. Clinton Presidential Library & Museum, WHC, Box C25, Folder 005, 58.

<sup>54</sup> 397 U.S. 254 (1970) (holding that procedural due process requires that a pre-termination evidentiary hearing must be held when public assistance payments to a welfare recipient are discontinued).

<sup>55</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (June 19, 1998), William J. Clinton Presidential Library & Museum, WHC, Box C25, Folder 005, 58.

<sup>56</sup> *Id.*

<sup>57</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (July 14, 1998), William J. Clinton Presidential Library & Museum, WHC, Box C25, Folder 003, 10.

<sup>58</sup> 152 F.3d 1115 (9th Cir. 1998).

decision. However, Democrats and health advocates worried that intervening in the case could undermine the Administration's effort to pass a Patient's Bill of Rights and make it harder for poor people to enforce Medicaid requirements. For these reasons, Kagan did not favor filing a petition for certiorari.<sup>59</sup>

A memo Kagan wrote during her clerkship for Justice Marshall provides further insight into her view of the scope of due process in the context of social welfare programs. In reviewing the certiorari petitions for two different child welfare cases, *Ledbetter v. Taylor*<sup>60</sup> and *Deshaney v. Winnebago County*,<sup>61</sup> Kagan considered the affirmative responsibility of state officials to protect children in dangerous situations.<sup>62</sup> In both cases, state officials knew of repeated abuse of young children but did not intervene. Consequently, both children sustained substantial physical harm that eventually resulted in their permanent comas. In their respective lawsuits, each petitioner argued that the failure of state officials to intercede resulted in a violation of each child's constitutional due process protections. In *Deshaney*, the appeals court denied the plaintiff's claim, finding no affirmative duty of state officials on a child's behalf. In *Ledbetter*, however, an en banc decision of the Eleventh Circuit Court of Appeals declared that a "special relationship" existed between a foster child and state officials; therefore an affirmative duty to protect a child's due process rights *did* exist. Although Kagan recognized a clear circuit split over this issue, she hedged on the Court's responsibility to clarify this confusion. Instead, Kagan warily noted that "some members of this Court will doubtless object" to a view of the Constitution encompassing active responsibilities instead of negative rights. In *Deshaney*, Kagan recommended waiting to see if other Justices accepted certiorari and joining if so. In *Ledbetter*, Kagan agreed that the Eleventh Circuit decision finding in favor of an affirmative duty was correct, but counseled against taking the case and resolving the circuit split.

## Reproductive Rights

Several thousand documents in Kagan's White House Counsel and DPC files concern abortion issues. While none of the documents expressly reflects Kagan's personal views, they all reflect a respect for *Roe v. Wade*<sup>63</sup> and a commitment to serving President Clinton's pro-choice agenda while avoiding controversy and pitched legislative battles whenever possible. During her Solicitor General confirmation process, Kagan expressed a strong commitment to the role played by *stare decisis* in reproductive rights policy. In written answers to questions posed by a Republican senator, Kagan wrote, "[u]nder 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

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<sup>59</sup> Memorandum from Elena Kagan et al. to President Clinton (Feb. 4, 1999), William J. Clinton Presidential Library & Museum, WHORM, Box 003, Folder 011, 3-6.

<sup>60</sup> 818 F.2d 791 (11th Cir. 1987) (en banc).

<sup>61</sup> 812 F.2d 298 (7th Cir. 1987).

<sup>62</sup> Memorandum from Elena Kagan to Justice Marshall re: *Deshaney v. Winnebago County*, 87-154 (Sept. 3, 1987).

<sup>63</sup> 410 U.S. 113 (1973).

regulation. As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.”<sup>64</sup>

Some commentators have raised questions about the depth of her commitment to reproductive freedom.<sup>65</sup> For example, as a clerk for Justice Marshall, Kagan wrote in a memo that she considered it “ludicrous” to suggest that the Eighth Amendment protects incarcerated women’s ability to access medically necessary abortions.<sup>66</sup> And when working on reproductive health policy in the Clinton Administration, discussed in more detail below, Kagan took positions that were not as robust in terms of their protections of reproductive rights as those favored by women rights’ advocates.

Anti-choice advocates, on the other hand, have criticized Kagan for what they claim to be her support of cloning and for her apparent stance toward death with dignity. Following the recommendation of the National Bioethics Advisory Council, Kagan urged the President to call for a narrow ban on the cloning of humans, but not for the cloning of human embryos for research purposes—an issue which she stated warranted further research.<sup>67</sup> This position has been attacked by right-to-life groups. Similarly, she has been criticized by anti-choice groups for a comment she made opposing a nation-wide ban on physician assisted suicide, calling a ban “a fairly terrible idea.”<sup>68</sup>

### **Partial Birth Abortion**

Kagan’s files indicate that she was heavily involved in the White House legal and policy conversations throughout the ongoing legislative battles in 1995 and 1996 about so-called “partial birth” abortion. In 1996, Congress passed a “partial birth” abortion ban, prohibiting certain kinds of abortion techniques used in second- and third-trimester abortions; President Clinton vetoed the bill because it lacked an exception where necessary to preserve the health of the woman. Kagan appears to have been significantly involved in advising the President of the legal issues and political calculations involved in the legislative developments as the bill was drafted and amended in 1995 and 1996. Whether offering her own legal analysis or drafting press statements, talking points, or statements by the President, Kagan tended to be cautious about accurately reflecting the medical facts about and circumstances of the procedures under consideration. Nowhere in the files does she clearly express a personal view about “partial birth” abortion; she

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<sup>64</sup> *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (responses to written questions submitted by Sen. Chuck Grassley), available at <http://judiciary.senate.gov/>.

<sup>65</sup> Press Release, Ctr. for Reprod. Rights, Legal Analysis of Elena Kagan’s Record on Abortion Rights (June 21, 2010).

<sup>66</sup> Memorandum from Elena Kagan to Justice Marshall re: Lanzaro v. Monmouth County Correctional Institutional Inmates, 87-1431 (Apr. 26, 1988).

<sup>67</sup> Memorandum from Elena Kagan to President Clinton (May 29, 1997), William J. Clinton Presidential Library & Museum, Additional Materials, Folder 002, 87.

<sup>68</sup> Personal Note from Elena Kagan to Bruce Reed (undated), William J. Clinton Presidential Library & Museum, DPC, Box 002, Folder 011, 31.

was evidently motivated by her sense of duty to protect the President's chosen position on the issue and to advocate for the smoothest and least controversial agenda.

It is clear from Kagan's documents that she worked extensively to facilitate amendments that would yield a compromise bill in 1996 that adequately safeguarded the health of the woman so as to avoid a presidential veto. Memos among White House staff and to the President reflect that Kagan and her White House colleagues disagreed with OLC opinions, formulated by Walter Dellinger and Dawn Johnsen, about which proposed amendments would pass constitutional muster. Dellinger and Johnsen argued that Congress could not limit "partial birth" abortions before viability in any way, while Kagan and her colleagues claimed that a limit on pre-viability "partial birth" abortions to certain necessary medical circumstances met *Roe's* requirements.<sup>69</sup>

Kagan and her colleagues also disagreed with OLC about the scope of the health exception that Clinton insisted Congress include in any bill. Dellinger and Johnsen maintained that a "partial birth" abortion prohibition could not apply to any post-viability abortion where it is medically necessary to preserve the life of the woman or "avert an adverse health consequence to the woman." In his public statements, however, President Clinton called on Congress to include an exception where necessary to avert a "serious adverse health consequence." Dellinger told the White House that the Constitution requires a broad health exception, not one limited to "serious" or "grave" adverse consequences. However, Kagan and her colleagues continued to advise the President to limit his proposed exception to avert "serious" health consequences. As she wrote in a memo to Jack Quinn and Kathy Wallman in April 1996 regarding a contested sentence in a proposed Presidential statement, "The sentence says that the Constitution requires that women be protected from serious health threats. It does. Of course, under OLC's view, the Constitution also requires that women be protected from non-serious health threats. But we say nothing to the contrary. On OLC's view, the sentence may be underinclusive, but it is not inaccurate. If this is cutting the baloney too fine, we can (1) tell OLC we just don't care, or (2) change the sentence to make OLC happy.... I vote for option (1) because I think we should talk about both the Constitution and serious health threats[.]"<sup>70</sup>

The following year, anti-abortion members of Congress reintroduced "partial birth" abortion legislation. Kagan was highly engaged with pro-choice Democratic Senators' attempts to amend the bill to contain a life and health exception that would meet President Clinton's requirements for signing a bill. In May 1997, Kagan and Bruce Reed sent a memo to the President explaining an amendment proposed by Senator Tom Daschle (D-SD), an amendment proposed by Senator Diane Feinstein (D-CA), and their respective attempts to cure the constitutional defects of the original bill.<sup>71</sup> Both amendments changed the criminal penalties to civil penalties, applied only to post-

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<sup>69</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Apr. 2, 1996), William J. Clinton Presidential Library & Museum, DPC, Box C69, Folder 008, 61-62.

<sup>70</sup> *Id.*

<sup>71</sup> Memorandum from Elena Kagan & Bruce Reed to President William Clinton (May 13, 1997), William J. Clinton Presidential Library & Museum, White House Office of Records Management [hereinafter WHORM], Box 004, Folder 008, 4.

viability abortion, and applied to all abortion procedures, not just “partial birth.” The Feinstein Amendment essentially captured the language for which President Clinton had been advocating: it would exempt an abortion deemed medically necessary to avert serious health consequences to the woman. Kagan described the Daschle Amendment as “more stringent,” exempting an abortion only when it posed a risk of “grievous injury.” Kagan noted in her memo the OLC concluded both Daschle and Feinstein Amendments “properly read, violate *Roe* because they countenance tradeoffs involving women’s health.” Kagan also reported that the choice groups “somewhat reluctantly” supported the Feinstein language but opposed the Daschle amendment because its health exception is limited to physical harm and undermines *Roe*’s comprehensive protections regarding the health of the woman. Other memos in Kagan’s file notified her that Senator Boxer’s (D-CA) staff was “outraged” and suggested the need to do “[d]amage control” with women’s groups over the issue.<sup>72</sup> Nevertheless, Kagan and Reed recommended that President Clinton write a letter to Congress indicating his willingness to support either the Feinstein or the Daschle Amendment. Ultimately, both amendments failed. The bill passed in October 1997, again without an adequate health exception, and again Clinton vetoed it.<sup>73</sup>

### **Medicare Funding of Abortions**

The issue of whether the Hyde Amendment prohibited Medicare coverage of abortions arose in 1998, and Kagan weighed in on recommendations to the President as to which course to take on the question. In 1991, the Health Care Finance Administration (HCFA, the Medicare funding division of HHS) had issued a directive tracking the Hyde Amendment, in effect at the time, stating that Medicare would cover abortions only where the woman’s life was endangered. Congress later expanded the Hyde Amendment to encompass rape and incest, but HCFA did not change its directive. A June 1998 memo from Sean Maloney to President Clinton stated that all of the President’s advisors, including Kagan, recommended broadening the 1991 HCFA directive to permit Medicare funding of abortions in cases of rape or incest.<sup>74</sup> However, HHS urged the President to support a new rule that Medicare could cover abortions necessary to protect a woman’s health. Maloney wrote in his memo that Clinton’s advisors understood that failing to advocate HHS’s preferred position “may expose us to criticism about non-coverage of extremely sympathetic cases involving vulnerable and disabled women” and “will anger women’s groups, which would prefer us to provide Medicare coverage of the widest possible range of abortions, even if doing so would provoke the Republicans to enact contrary legislation.”<sup>75</sup> Nevertheless, Kagan and her colleagues concluded that limiting

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<sup>72</sup> E-mail from Tracey Thornton to Elena Kagan et. al. (May 12, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 001, Folder 005, 30.

<sup>73</sup> In 2003, Congress passed a similar ban, which President Bush signed into law. In a 2006 ruling, *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court upheld the ban, reversing a 2000 precedent and for the first time upholding the constitutionality of an abortion regulation that did not include a health exception.

<sup>74</sup> Memorandum from Sean Maloney to President Clinton, (Jun. 16, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 001, Folder 016, 11-15.

<sup>75</sup> Memorandum from Elena Kagan & Bruce Reed to President Clinton (May 13, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 001, Folder 005, 6.

the directive to cases of rape or incest was the option most likely to “avoid a legislative showdown on abortion funding that we are unlikely to win.”<sup>76</sup>

## Contraception

Two boxes in Kagan’s documents concern proposals to establish contraceptive equity in health insurance plans.<sup>77</sup> Memos and letters in the files from reproductive rights advocates at the beginning of Clinton’s second term encouraged him to spearhead efforts to mandate insurance coverage of contraception. Many of Kagan’s documents relate to an amendment proposed by Congresswoman Nita Lowey (D-NY) to require the federal employees’ health plans to cover contraception and an amendment proposed by Senators Olympia Snowe (R-ME) and Harry Reid (D-NV) to mandate private insurance coverage as well. The files imply that Kagan, along with her White House colleagues, did not support the proposed amendments. Recent press accounts mistakenly reported Kagan as questioning why the government would mandate insurance coverage of contraception when it does not mandate insurance coverage of eyeglasses for kids; however this comment was actually made by DPC colleague Jennifer Klein.<sup>78</sup>

## The Second Amendment

While serving in the White House, Kagan was deeply involved in many of the Clinton Administration’s initiatives to curb gun violence. Her early work focused on promoting Administration initiatives to extend and strengthen the Brady Bill, including extending background checks to include juvenile records; later she became extensively involved in the Clinton Administration’s response to the Supreme Court decision invalidating portions of the Brady’s law requirement of instant background checks. In anticipation of the decision, Kagan proactively questioned what the President could do unilaterally via executive action to keep in place some of the requirements of conducting background checks before gun purchases. She was also very engaged with other Clinton-era gun restrictions, including: extending efforts to promote gun safety locks; efforts to make firearms identifiable so they can be traced back to their original owners; extension of the Assault Weapons Ban; and creation of a directive to the Secretary of the Treasury regarding the importation of modified semiautomatic assault rifles.

While it appears that Kagan consistently supported the Clinton Administration’s gun restrictions, she was critical of an attempt to retroactively apply a ban on the importation of high-capacity ammo clips. The Bureau of Alcohol Tobacco and Firearms general counsel authored a 1995 memo analyzing the 1994 Crime Act, which banned importation of clips manufactured after the date of the bill. ATF argued that the ban should apply retroactively to all clips, “regardless of their date of manufacture.” In the

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<sup>76</sup> *Id.*

<sup>77</sup> Materials on Women’s Issues-Contraception, William J. Clinton Presidential Library & Museum, DPC, Box 067, Folders 013-14, *passim*.

<sup>78</sup> E-mail from Jennifer Klein to Elena Kagan (July 3, 1997), William J. Clinton Presidential Library & Museum, DPC Box 067, Folder 013, 30.

margins of the memo, she noted “Plain language, guys”—apparently indicating her belief that a strict interpretation of the Act left no room to extend the Ban to earlier manufactured clips.<sup>79</sup> She also noted that the ATF’s argument for going beyond the statutory language “sounds pretty desperate.”<sup>80</sup> Another memo authored on April 11, 1996, reveals that the Clinton Administration’s opposition to the ATF interpretation was at Congressman Dingell’s (D-MI) urging.<sup>81</sup>

Opponents of gun regulations have reached back to a 1987 memo Kagan drafted while serving as a clerk for Justice Marshall, recommending against granting certiorari in *Sandidge v. United States*<sup>82</sup> to a man convicted of carrying an unregistered pistol without a license. Kagan wrote that petitioner’s “sole contention is that the District of Columbia’s firearms statutes violate his constitutional right to “keep and bear Arms. I’m not sympathetic.”<sup>83</sup> This comment stands in contrast to the Supreme Court’s recent 2008 split decision in *Heller v. District of Columbia*, which established an individual’s Second Amendment right to bear arms and held that D.C.’s restrictions on handgun ownership were unconstitutional.<sup>84</sup> Second Amendment proponents have also criticized Solicitor General Kagan for not filing an amicus brief in *McDonald v. Chicago*, a case that challenged a Chicago gun registration law.<sup>85</sup>

## The Takings Clause

The only glimpse of Kagan’s approach to the Takings Clause can be found in a memo written during her clerkship for Justice Marshall analyzing a decision from the Ninth Circuit which, in her words, “takes on and revamps most of takings law.” In *City of Santa Barbara v. Hall*,<sup>86</sup> mobile park owners objected to a city ordinance that set limits on rent increases in mobile home parks and mandated that tenants could only be evicted by park owners for cause. While the District Court dismissed the case, the Court of Appeals reversed, declaring the case should go to trial and, as Kagan read it, “strongly suggest[ing] . . . the invalidation of the rent control ordinance under the Fifth Amendment.” Writing that the court’s “argument is absurd,” Kagan derided the Ninth Circuit’s reasoning “that the rent control ordinance constituted a taking” because “(believe it or not) [they stated] that this case is a physical occupation case.”<sup>87</sup> She also objected to the Court of Appeals raising the question of whether “the statute advances a legitimate government interest.” Stating that “[a]ll in all, this opinion is outrageous,”

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<sup>79</sup> Memorandum from Brad Buckles, Bureau of Alcohol, Tobacco and Firearms to Neal Wolin (Jul. 10, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C06, Folder 012, 20.

<sup>80</sup> *Id.* at 21.

<sup>81</sup> Memorandum from Elena Kagan to Tim Keating (Apr. 11, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C06, Folder 012, 2.

<sup>82</sup> 520 A.2d 1057 (D.C. 1987).

<sup>83</sup> Memorandum from Elena Kagan to Justice Marshall re: *Sandidge v. United States*, 87-5293 (Aug. 27, 1987).

<sup>84</sup> 128 S. Ct. 2783 (2008).

<sup>85</sup> No. 08-1521 (Mar. 2, 2009) (decision pending).

<sup>86</sup> 797 F.2d 1493 (9th Cir. 1986).

<sup>87</sup> Memorandum from Elena Kagan to Justice Marshall re: *City of Santa Barbara v. Hall*, 87-220 (Sept. 12, 1987).

Kagan concluded that the circuit court was overreaching, having “flouted the opinions of this Court and . . . reached a result that is sweeping in its implications. . . . [I]t is authorization for broad, wholesale attacks on rent control regulation.”<sup>88</sup>

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<sup>88</sup> *Id.*

## IV. CIVIL RIGHTS

During her tenure in the Clinton Administration, Kagan worked on many civil rights issues. Affirmative action was under assault in the courts, and Kagan was often asked to weigh in on legal challenges involving race-based policies. She also participated in legislative initiatives such as One America, which focused on race-neutral solutions that sought to reduce racial inequalities by targeting policies on education, economic empowerment, health, crime, and civil rights enforcement. According to the rationale of the initiative, “increasing job opportunities for unemployed and underemployed blacks and Latinos, and assimilating them into the workplace, is the way to strike right at the economic root of racism in our society.”<sup>89</sup> Kagan wrote, however, that while the Administration’s attention would focus on race-neutral policies, “there is still a need for a strong civil rights enforcement, narrowly tailored affirmative action programs, and certain other kinds of targeted initiatives.”<sup>90</sup>

### Affirmative Action

Of the many legal challenges to affirmative action that Kagan weighed in on, the most high-profile is *Piscataway Township Board of Education v. Taxman*,<sup>91</sup> in which Kagan favored a strategy that would avoid presenting the Supreme Court with an opportunity to make a broad, adverse ruling invalidating a wide array of affirmative action programs.<sup>92</sup> In *Piscataway*, two teachers with equal seniority were up for termination, and citing its affirmative action policy, the Board of Education decided to layoff the white teacher rather than the black teacher. The white teacher successfully sued the Board, claiming that the Board’s affirmative action policy violated Title VII. The Board filed a petition for certiorari to the Supreme Court, and acting Solicitor General Walter Dellinger recommended that the government file a brief supporting the judgment awarded to the white teacher on the grounds that the school board had not proven that the layoff was justified by its interest in promoting diversity. The strategy sought to avoid presenting the Supreme Court with an opportunity to make a broad, adverse ruling invalidating a wide array of affirmative action programs. Dellinger believed there was a good chance that, given the opportunity, the Supreme Court would hold that non-remedial affirmative action was *never* permissible—a holding that would be “a disaster for civil rights in employment.” Reviewing Dellinger’s recommendation, Kagan wrote, “I think this is exactly the right position – as a legal matter, as a policy matter, and as a political matter.”<sup>93</sup>

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<sup>89</sup> Draft Memorandum from Elena Kagan & Bruce Reed to President Clinton (undated), William J. Clinton Presidential Library & Museum, Additional Materials, Folder 003, 58-61.

<sup>90</sup> Memorandum from Elena Kagan & Bruce Reed to President Clinton (Nov. 11, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 041, Folder 003, 44.

<sup>91</sup> 521 U.S. 1117 (1997).

<sup>92</sup> Memorandum from Walter Dellinger to Attorney General Janet Reno (Jul. 29, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 038, Folder 002, 26.

<sup>93</sup> *Id.*

Similarly, Kagan favored staying out of a legal challenge to California’s ban on affirmative action, Prop 209—even though the Administration believed the law to be unconstitutional—for fear that interfering would do more harm than good to affirmative action. A 1997 memo written by Charles Ruff reasoned that were the government to file an uninvited certiorari brief, the Supreme Court would likely view it as a political statement and be even more likely to uphold Prop 209. Rather than filing a brief challenging the law’s constitutionality, the memo advocated waiting to see if the Court granted certiorari, or invited the government to submit a brief, and if so, forcefully arguing that Prop 209 was unconstitutional. Kagan noted that this was the “right recommendation.”<sup>94</sup> In both *Piscataway* and the Prop 209 case, Kagan urged refraining from defending affirmative action in the legal challenge at hand, but in both cases her position was based on a desire to protect affirmative action interests in the long-term.

Additionally, while clerking for Justice Marshall, Kagan wrote a memorandum discussing efforts to address school segregation by rezoning.<sup>95</sup> In her memo, Kagan considered a Texas school district’s efforts to prevent the development of racially homogenous schools. The school district noted a growing trend of self-segregation, and instituted a school rezoning plan that took race and ethnic factors into account. Plaintiffs challenged the constitutionality of the rezoning program in Texas State Supreme Court, relying heavily on the Supreme Court’s decision in *Wygant v. Jackson Bd. of Ed*<sup>96</sup> and arguing that absent prior historical segregation, the school district could not institute new policies using race as a factor. The Texas state courts rejected the appellant’s challenge and upheld the school district’s right to institute new rezoning mechanisms. Kagan wrote that this approach was “amazingly sensible” and applauded the court’s action as a “recognition of good sense and fairmindedness.” These statements imply that Kagan was inclined to favorable views about affirmative action and its role in the American school system.

## Hate Crimes

Kagan was heavily involved in the Clinton Administration’s effort to pass hate crimes legislation. In June 1997, Kagan approved of draft legislative language which would expand hate crimes to include crimes based on gender, sexual orientation, and disability.<sup>97</sup> In August 1997, she made favorable comments about a memo from then-Attorney General Reno outlining strategy and plans for a National Anti-Hate Crime

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<sup>94</sup> Memorandum from Charles Ruff to President Clinton (Sept. 24, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 040, Folder 010, 2.

<sup>95</sup> Memorandum from Elena Kagan to Justice Marshall re: City for Better Education v. Goose County Sch. Dist., 86-2061 (Aug. 27, 1987).

<sup>96</sup> 476 U.S. 267 (1986).

<sup>97</sup> Memorandum from Legislative Subgroup to Hate Crimes Working Group (June 30, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 040, Folder 002, 68.

Initiative.<sup>98</sup> Kagan wrote, “this looks good” and questioned how the Administration could get more involved.

## **LGBT Rights**

While Dean of Harvard Law School Kagan described Don’t Ask, Don’t Tell as “a moral injustice of the first order,”<sup>99</sup> and publicly opposed the Solomon Amendment – a federal law that allows the Secretary of Defense to deny federal grants to institutions of higher education if they bar military recruiters from campus. As Dean, she continued Harvard’s longstanding policy of excluding the military from on-campus recruiting programs because Don’t Ask, Don’t Tell violated the University’s nondiscrimination policy. However, Kagan ensured that interested students had convenient but unofficial access to military recruiters.

Meanwhile, threatened with funding cuts to their entire universities, several dozen law schools banded together to file a lawsuit challenging the Solomon Amendment. When the case reached the Supreme Court, Dean Kagan and 39 other Harvard law professors signed an amicus brief urging the Court to invalidate the funding restriction. In an e-mail to the Harvard Law School community about the lawsuit, she wrote that “[t]his is a difficult issue . . . I believe [this is] a core matter. I believe that discrimination against gays and lesbians seeking to enter military service is wrong—both unwise and unjust. And this wrong harms the fabric of our community by denying an opportunity to some of our students that other of our students have.”<sup>100</sup> Initially, the Third Circuit enjoined enforcement of the Solomon Amendment, and Harvard returned to its policy of “nondiscrimination without exception” and exclusion of military recruiters. In 2006, however, the Supreme Court, in an 8-0 decision, upheld the Solomon Amendment, holding that the Amendment regulated conduct, not speech, and did not compel conduct in violation of the First Amendment.<sup>101</sup> In another e-mail to the law school community, Kagan wrote, “I am disappointed by this decision.”<sup>102</sup>

Kagan appears to never have expressed an opinion about marriage equality except in response to written questions from Senators as part of her Solicitor General confirmation process. In her answers, she wrote, “There is no federal constitutional right to same-sex marriage.” It is impossible to know whether this statement expresses her personal belief that such a right should not exist, or whether she is simply summarizing the current state of the law.

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<sup>98</sup> Memorandum from Attorney General Janet Reno to All United States Attorneys (Aug. 8, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 040, Folder 002, 42-46.

<sup>99</sup> E-mail from Elena Kagan to Harvard Law School Community (Oct. 6, 2003), Senate Judiciary Committee Questionnaire and Related Materials on the Nomination of Elena Kagan to be an Associate Justice of the U. S. Supreme Court [hereinafter Kagan Supreme Court Questionnaire] (May 18, 2010), 12H.

<sup>100</sup> E-mail from Elena Kagan to Harvard Law School Community (Oct. 1, 2008), Kagan Supreme Court Questionnaire, 12H (May 18, 2010).

<sup>101</sup> *Rumsfeld v. FAIR*, 547 U.S. 47 (2006).

<sup>102</sup> E-mail from Elena Kagan to Harvard Law School Community (Mar. 7, 2008), Kagan Supreme Court Questionnaire, 12H (May 18, 2010).

As Solicitor General, Kagan decided not to appeal an adverse ruling in *Witt v. Department of Air Force*, a case in which the Ninth Circuit applied heightened scrutiny to a challenge to Don't Ask, Don't Tell.<sup>103</sup> Kagan's decision not to appeal this decision is notable both because it created a circuit split and because it starkly departed from the position taken by the Bush Department of Justice, under which the Solicitor General's Office had petitioned for a rehearing en banc of the Ninth Circuit's panel decision. The case was remanded for the District Court to issue a ruling applying heightened scrutiny.

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<sup>103</sup> 527 F.3d 806 (9th Cir.), *reh'g denied*, 548 F.3d 1264 (2008).

## V. CRIMINAL JUSTICE

A review of Kagan's record as Solicitor General and her work in the Clinton White House suggests that she tends to prioritize the needs of prosecutors and law enforcement over the constitutional rights of criminal defendants. Kagan's record on criminal justice is particularly important because she will fill a seat that has for over thirty years been held by a stalwart protector of criminal defendants' constitutional rights. When the Supreme Court recently chipped away at the constitutional right to counsel in *Montejo v. Louisiana*,<sup>104</sup> Justice Stevens lambasted the majority for reaching out to change the law rather than answering the narrow question presented to the Court. In a strongly worded dissent that clearly articulated the harmful impact of this erosion of the Constitution, Stevens criticized the majority for dishonoring and doing damage to "the integrity of the Sixth Amendment right to counsel."

### **Criminal Law Cases During Kagan's Solicitor General Tenure**

Roughly one third of the cases handled by the Solicitor General's Office are criminal cases, and Kagan has personally participated in a number of such cases. She 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 *Montejo*, Kagan submitted an uninvited amicus brief, urging the Court to overrule *Michigan v. Jackson*,<sup>105</sup> a 1986 decision assuring that the 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. Kagan'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 Kagan's position and arguing that *Jackson* provided a bright-line rule that had become embedded in routine police practice, just as *Miranda*<sup>106</sup> had. The Supreme Court recently overruled *Michigan v. Jackson* in a 5-4 decision.<sup>107</sup> As a result, a criminal defendant can now be considered to have waived his right to counsel unless he reasserts it every time he is interrogated.

Similarly, in *Maryland v. Shatzer*, Kagan submitted an uninvited amicus brief to argue that an invocation of the right to counsel is terminated when there is a break in custody.<sup>108</sup> 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.<sup>109</sup>

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<sup>104</sup> 129 S. Ct. 2079 (2009).

<sup>105</sup> 475 U.S. 625 (1986).

<sup>106</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>107</sup> 129 S. Ct. 2079 (2009).

<sup>108</sup> 130 S. Ct. 1213 (2010).

<sup>109</sup> *Id.*

Additionally, Kagan advocated weakening the protections provided by *Miranda* in *Florida v. Powell*.<sup>110</sup> There, the Solicitor General voluntarily intervened as an 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. Kagan'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 is communicated.

In *Berghuis v. Thompkins*, the Solicitor General again voluntarily intervened as an 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.<sup>111</sup> 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, but Justice Sonia Sotomayor, in a strongly worded dissent, argued that the decision "turns *Miranda* upside down" by requiring "a suspect who wishes to guard his right to remain silent, to . . . counterintuitively, speak."<sup>112</sup>

In *Padilla v. Kentucky*, the Solicitor General's Office again filed an uninvited amicus brief, arguing that a defense attorney does not have an affirmative obligation under the constitutional requirement for effective assistance of counsel to advise a client that a guilty plea carries a risk of deportation.<sup>113</sup> 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 giving a client the wrong advice about the collateral immigration consequences of a guilty plea might constitute a Sixth Amendment violation if the defendant was prejudiced. The Supreme Court rejected the Solicitor General's position, holding that a lawyer representing an immigrant charged with crimes has an affirmative Sixth Amendment obligation to inform the client that a guilty plea could result in deportation.

Solicitor General Kagan appeared for oral argument before the Court in *Robertson v. United States ex rel. Watson*, after the Solicitor General's Office was invited to appear as an amicus.<sup>114</sup> The case involved a challenge to a domestic violence victim's private prosecution of her abuser for criminal contempt. 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. At oral argument Kagan notably 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

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<sup>110</sup> 130 S. Ct. 1195 (2010).

<sup>111</sup> No. 08-1470, 2010 WL 2160784 (U.S. June 1, 2010).

<sup>112</sup> *Id.* (Sotomayor, J., dissenting).

<sup>113</sup> 130 S. Ct. 1473 (2010).

<sup>114</sup> No. 08-6261, 2010 WL 2025205 (U.S. May 24, 2010).

Justice Roberts found “absolutely startling.”<sup>115</sup> The Supreme Court recently issued a per curiam dismissal of the writ of certiorari as improvidently granted.<sup>116</sup> The Court’s dismissal allowed the private prosecution of the criminal contempt charges to stand—the result advocated for by the Solicitor General’s Office.

The Solicitor General’s Office also participated as an uninvited amicus in *Pottawattamie County v. McGhee*.<sup>117</sup> In this case, county prosecutors had fabricated evidence during a murder investigation and introduced it at trial to prove the guilt of two 16-year-old defendants.<sup>118</sup> The defendants spent 25 years in prison before they were exonerated. They brought suit against the county prosecutors for damages, and Kagan’s brief argued for absolute immunity for the prosecutors. Oral argument suggested that the government was on its way to a lopsided loss, and probably as a result, the case settled, avoiding what likely would have been a ruling that would open prosecutors to liability for fabricating evidence.

Under Kagan’s tenure, the Solicitor General’s Office has advocated for tough applications of criminal statutes, and in particular, 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.<sup>119</sup> 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 preponderance of the evidence, rather than proven as an element of the offense beyond a reasonable doubt.<sup>120</sup> The Supreme Court recently issued a decision rejecting this position. And in *Carachuri-Rosendo v. Holder*, the Solicitor General argued 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.<sup>121</sup> The Court recently rejected the government’s position in a 9-0 decision.<sup>122</sup>

In *Dillon v. United States*, a case that has significant implications for defendants sentenced for crimes involving crack cocaine, 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 they do not have discretion to issue sentences lower than what is specified in the amended Sentencing Guidelines.<sup>123</sup> The petitioner argued that constraining judges’ discretion in re-sentencing

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<sup>115</sup> Transcript of Oral Argument at 56:16–56:17, *Robertson*, No. 08-6261 (March 31, 2010).

<sup>116</sup> No. 08-6261, 2010 WL 2025205 (U.S. May 24, 2010).

<sup>117</sup> 129 S. Ct. 2002 (2009)

<sup>118</sup> *Id.*

<sup>119</sup> 130 S. Ct. 1265 (2010).

<sup>120</sup> No. 08-1569, 2010 WL 2025204 (U.S. May 24, 2010).

<sup>121</sup> No. 09-60, 2010 WL 2346552 (U.S. June 14, 2010).

<sup>122</sup> *Id.*

<sup>123</sup> No. 09-6338, 2010 WL 2400109 (U.S. June 17, 2010).

proceedings runs afoul of *United States v. Booker*.<sup>124</sup> The Court recently accepted the government’s position in a 7-1 decision, with Justice Alito not participating.<sup>125</sup> This case will have wide-ranging consequences for the thousands of defendants currently incarcerated for crimes involving crack cocaine and who may be eligible for a re-sentencing following the Sentencing Commission’s reduction of the crack/cocaine disparity in the Sentencing Guidelines.

While her record as Solicitor General is decidedly pro-prosecution, in at least a couple of instances where the Solicitor General’s Office decided not to appeal a case, Kagan’s record demonstrates more deference to the rights of the accused. For instance, she 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.”<sup>126</sup> But advocates for criminal defendants have praised this decision. 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.<sup>127</sup>

### **Clinton White House Criminal Justice Initiatives**

While in the Domestic Policy Council and White House Counsel’s Office, Elena Kagan handled a variety of criminal law issues, and frequently weighed in on cases under review in the Solicitor General’s Office. For instance, Kagan apparently favored filing an *amicus* brief in support of a Wisconsin Supreme Court decision allowing police to conduct “no-knock drug searches.” The Fourth Amendment generally requires police with a warrant to “knock and announce” their presence before entering a residence, but the Wisconsin Supreme Court created a blanket exception in cases involving drug searches. A few years earlier, the U.S. Supreme Court had unanimously upheld the constitutionality of the “knock and announce” requirement, ruling that the Fourth Amendment required judicial review on a case-by-case basis in these matters. Kagan wrote a note to Bruce Reed, Dennis Burke, and DOJ attorneys, suggesting that the Solicitor General’s Office file a brief in support of the Wisconsin decision. When the Court ruled on the case, in a decision by Justice Stevens, it unanimously rejected Wisconsin’s blanket exception, again upholding “knock and announce.”<sup>128</sup>

Kagan was also apparently intrigued by the idea of using “public shaming” as a punishment in lieu of imprisonment. A 1997 Wall Street Journal op-ed encouraged the use of “shaming punishments,” such as making DUI offenders display bumper stickers

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<sup>124</sup> 543 U.S. 220 (2005).

<sup>125</sup> No. 09-6338, 2010 WL 2400109 (U.S. June 17, 2010).

<sup>126</sup> *Limone v. United States*, 579 F.3d 79, 106 (1<sup>st</sup> Cir. 2009).

<sup>127</sup> *Berghuis v. Smith*, 130 S. Ct. 1382 (2010).

<sup>128</sup> Personal Note from Elena Kagan to Bruce Reed & Dennis Burke (undated), William J. Clinton Presidential Library & Museum, DPC, Box 011, Folder 026, 3.

and marking the homes of convicted sex offenders. Affixed to a copy of the article, Kagan wrote a note that reads, “To Bruce/Dennis—Have you seen these? Do you think there’s a way of sensibly hooking into this trend?”<sup>129</sup>

Another idea that she worked on was the concept of lifetime parole for sexual offenders—i.e., lifetime monitoring of persons who committed sexual offenses. Kagan apparently took interest in a news article exploring the idea and later followed up with aides asking whether this idea had ever been acted on.<sup>130</sup> She was involved in the Administration’s efforts to work with states to create a national sex offender registry, particularly working on including federal and military offenders into the registry.

Kagan also urged the Administration to advocate for legislation that would reduce, but not eliminate, the disparity in crack versus powder cocaine mandatory minimum sentences. In a July 1997 memo, Kagan and Bruce Reed supported reducing the disparity from a ratio of 100:1 to 10:1.<sup>131</sup> The memo noted that the Congressional Black Caucus would have preferred eliminating the disparity altogether, whereas Republicans sought to eliminate the disparity by raising mandatory minimums for powder cocaine. Kagan felt that the 10:1 ratio represented the “middle ground” and was “the best hope of achieving progress on the issue.” The crack/cocaine sentencing disparity remains in place today. A current proposal in the Senate would reduce the disparity to 18:1.<sup>132</sup>

Kagan expressed skepticism over the medical use of marijuana, noting that “current research doesn’t support medical uses of marijuana.”<sup>133</sup> Further, a note authored by one of Kagan’s colleagues indicates that she shares the same views on medical marijuana as Dr. Jack Lewin, Executive Director of the California Medical Association,<sup>134</sup> who was critical of recommending smoking marijuana except for life-threatening illnesses.<sup>135</sup> She was also critical of a government brief outlining the government’s policy regarding enforcement of the Controlled Substances Act against physicians who discuss marijuana with patients, though it is unclear whether her criticism

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<sup>129</sup> Personal Note from Elena Kagan to Bruce Reed & Dennis Burke (undated), William J. Clinton Presidential Library & Museum, DPC, Box 011, Folder 041, 2.

<sup>130</sup> E-mail from Elena Kagan to Kathy Wallman (Apr. 27, 1997), DPC, Box 011, Folder 040, 18.

<sup>131</sup> Memorandum from Elena Kagan & Bruce Reed to President William Clinton (July 3, 1997), William J. Clinton Presidential Library & Museum, WHORM, Box W003, Folder 014, 6-8.

<sup>132</sup> Debra J. Saunders, *Crack and Powder, Dems and Repubs*, S.F. CHRON., June 15, 2010, at A14.

<sup>133</sup> Handwritten Notes from Elena Kagan to Bruce Reed (undated), William J. Clinton Presidential Library & Museum, DPC, Box 015, Folder 013, 9.

<sup>134</sup> Handwritten Notes from C.J. to Elena Kagan (undated), William J. Clinton Presidential Library & Museum, DPC, Box 015, Folder 013, 36.

<sup>135</sup> Todd Zwillich, *Supreme Court Rules Against Medical Marijuana*, WEBMD MED. NEWS, June 6, 2005 (“‘We think that there’s still a lot to learn about the efficacy of medical marijuana. But the government was deciding on behalf of doctors and patients what the appropriate care is, and that is inappropriate,’ says Jack Lewin, MD, a family physician and CEO of the California Medical Association.”).

(“I’m not all that happy with it”) was directed at the underlying policy outlined in the brief or merely the way the brief was written.<sup>136</sup>

In the wake of a number of domestic terrorism incidents – some of which involved significant civil rights violations by federal officers – including Waco, the Oklahoma City bombings, and Ruby Ridge, the Clinton Administration was engaged in numerous efforts to improve counterterrorism and law enforcement policies.<sup>137</sup> In August 1995, Kagan co-authored two memos with Abner Mikva assessing recent domestic terrorism incidents and proposing policy initiatives to improve the government’s ability to protect the public from paramilitary threats.<sup>138</sup> In those memos, Kagan advocated for strong counterterrorism legislation that would support law enforcement anti-paramilitary training programs, strengthen prosecutions of threats or assaults against federal officers, and allow the federal government to withhold monies from local authorities who attempt to defy federal jurisdiction.<sup>139</sup> She also recommended ways to safeguard against excessive federal power. For example, to make it easier for law enforcement agencies to remove agents who violate codes of conduct when enforcing federal law, she suggested strengthening the guidelines governing the Merit System Protection Board (MSPB) federal employee oversight framework.<sup>140</sup> In handwritten notes on a draft version of the “Protection for Victims of Paramilitary Violence Act,”<sup>141</sup> she wrote: “[the administration’s] real concerns [are] federal” and that the statute should be careful to avoid “mak[ing] [the] whole political system of states [and] localities subject to fed[eral] neg[ation].”<sup>142</sup>

## Marshall Clerkship

While Kagan has often taken a narrow view of criminal defendants’ constitutional rights, when serving as a clerk for Justice Marshall she authored a memo strongly defending the Fourth Amendment.<sup>143</sup> The memo argued that the Justice should vote to deny certiorari on a case involving a questionable *Terry* stop by police officers. The officers, acting without probable cause, forced two individuals to lie face down on the

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<sup>136</sup> Personal Note from Elena Kagan to Jose Cerda & Leanne Shimabukuro (undated), William J. Clinton Presidential Library & Museum, DPC, Box 015, Folder 013, 24.

<sup>137</sup> Handwritten Notes from Elena Kagan (undated), William J. Clinton Presidential Library & Museum, WHC, Box C32, Folder 004, 18.

<sup>138</sup> Memorandum from Elena Kagan & Abner Mikva to Leon Panetta (Aug. 9, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C32, Folder 009, 84-90; Memorandum from Elena Kagan & Abner Kikva to President Clinton (Aug. 14, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C32, Folder 009, 79-80.

<sup>139</sup> Memorandum from Elena Kagan & Abner Mikva to Leon Panetta (Aug. 9, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C32, Folder 009, 84-90.

<sup>140</sup> *Id.*

<sup>141</sup> The bill was ultimately introduced as the “Republican Form of Government Guarantee Act.” H.R. 2580, 104th Cong. (1995).

<sup>142</sup> Handwritten Notes (undated), William J. Clinton Presidential Library & Museum, WHC, Box C32, Folder 007, 19-30.

<sup>143</sup> Memorandum from Elena Kagan to Justice Marshall re: *Paskins v. Illinois*, 87-5306 (Sept. 5, 1987).

ground for three to four minutes until a backup unit arrived. The officers then placed the individuals against the car and patted them down. The Court of Appeals held that the incident constituted merely a *Terry* stop, as opposed to a more serious arrest, because the police used the least intrusive means and the incident lasted only five minutes. Kagan commented that the Court of Appeals ruling was “fairly outrageous [sic],” indicating that she thought that the Fourth Amendment protections were more robust than the Circuit Court had concluded. Nevertheless, Kagan recommended against granting certiorari lest the Court agree with the Court of Appeals and fashion “an awful and perhaps quite consequential holding.”<sup>144</sup>

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<sup>144</sup> *Id.*

## VI. IMMIGRATION

While in the Clinton White House, Kagan worked on wide range of projects concerning immigration law, including legislative proposals about guestworker visas, administrative reforms to the INS, and litigation over challenges to a range of policies affecting immigrant communities.<sup>145</sup>

In 1998, Kagan came out strongly against an amendment to the H-2A agricultural workers visa program. The H-2A program provides agricultural “guestworkers” a visa on a temporary basis, allowing them to work in the U.S. briefly. In order to obtain an H-2A visa for an immigrant hired at the time of the proposed amendment, employers had to demonstrate to the Department of Labor that insufficient U.S. workers existed for the position and that U.S. workers would not be adversely affected through immigration hires. Beginning in 1995, Congress undertook efforts to create a new guestworker program that responded to growers’ requests for a streamlined program. In July 1998, Senators Ron Wyden (D-OR), Bob Graham (D-FL), and Gordon Smith (R-OR) introduced an amendment to the bill that proffered significant alterations to the existing H-2A program. The Wyden-Graham Amendment essentially shifted risks and responsibility away from employers and onto immigrant workers and the government.<sup>146</sup> In a memo co-authored with Sally Katzen, Kagan warned that the Wyden-Graham Amendment would erode protections for U.S. farmworkers and did not sufficiently protect the interests of guestworkers.<sup>147</sup> Specifically, Kagan worried that the Amendment would eliminate employers’ private recruitment requirement, erode U.S. worker wages, not supply adequate housing for guestworkers, eliminate U.S. and foreign worker hiring requirements, and accept the practice of employer wage withholding to encourage repatriation.<sup>148</sup>

Earlier that year, Kagan also co-authored a memo with Bruce Reed assessing suggestions made by the U.S. Commission on Immigration Reform (CIR) to reform the Immigration and Naturalization Service (INS). CIR’s original memo advocated for significant reforms to INS by reallocating its major responsibilities to other federal agencies. In their response memo, Kagan and Reed agreed that the lack of separation between INS’s enforcement and service operations had led to inefficiencies, but rejected CIR’s proposal to dismantle the INS. Instead, Kagan and Reed proposed an internal re-

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<sup>145</sup> Some have questioned Kagan’s use of the phrase “lots of legal gobbledygook” to describe the complexities of immigration law. The note was written on a memo to Bruce Reed and warned him: “Lots of legal gobbledygook: don’t spend too much time on it. Instead, read the memo signed by you!” It is unclear whether this note is reflective of her views on immigration but may warrant further questioning. Memorandum from Elena Kagan to Bruce Reed (undated), William J. Clinton Presidential Library & Museum, DPC, Box 032, Folder 009, 10.

<sup>146</sup> Memorandum from Julie Fernandes & Cecilia Rouse to Elena Kagan & Sally Katzen (Sept. 14, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 033, Folder 007, 43.

<sup>147</sup> Memorandum from Elena Kagan & Sally Katzen to White House Chief of Staff Erksine Bowles (Sept. 14, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 033, Folder 007, 38.

<sup>148</sup> *Id.* at 40.

organization of INS's departments—complete with organization charts—rather than breaking up enforcement and delivery of services into two separate agencies.<sup>149</sup>

While serving as White House Legal Counsel, Kagan expressed her opinion that an English-only initiative might be unconstitutional. In a 1996 memo to Jack Quinn and Kathy Wallman, Kagan assessed the merits of a pending Supreme Court case, *Yniguez v. Arizona*.<sup>150</sup> In *Yniguez*, the Ninth Circuit had invalidated Arizona's law declaring English as the official state language, holding that requiring government officials to use only English ran afoul of First Amendment protections. In her memo, Kagan relayed the DOJ Civil Rights Division's recommendation against filing an amicus brief because the opinion is "extremely expansive and very possibly wrong."<sup>151</sup> Despite this concern, she disagreed with the Solicitor General's recommendation to file an amicus dealing solely with the jurisdictional issue of standing, rather than addressing the merits.<sup>152</sup> In Kagan's view, the Solicitor General's approach would result in the Administration receiving "whatever blame attaches to entering the case on [the English-only] side, without the benefit of taking a principled stand on the issue."<sup>153</sup> In short, Kagan believed that weighing in on a jurisdictional issue without taking a "principled stand" was not worth the consequential blame.

In a memo that has been widely covered in recent media as revealing something about her stance on immigration, Kagan outlined a New York City lawsuit challenging a federal law's provision that city employees may report illegal immigrants in spite of a contrary local law. In the 1996 memo, Kagan recommended "check[ing] with DOJ as to how it intends to handle the suit." Along the margins, Kagan's boss, Jack Quinn, wrote that he assumes DOJ will "vigorously defend" the federal law and stated that checking with DOJ seemed "nearly frivolous." In response, Kagan agreed that DOJ's future position was clear, but defended her original recommendation. She wrote that due to "strong interest" from "policy people," an indication from DOJ about their future actions and timing "might be helpful."<sup>154</sup> It is evident that Kagan's rhetoric has been mischaracterized. It does not comment on the nature of the New York City suit itself, or provide insight into her views on immigration policy.

More recently, in *Kucana v. Holder*, Solicitor General Kagan argued in favor of judicial review of the Board of Immigration Appeals (BIA) decisions not to reopen petitioner's asylum case—a position that has been praised by advocates of immigrants.<sup>155</sup>

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<sup>149</sup> Memorandum from Elena Kagan & Bruce Reed to President William Clinton (Mar. 19, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 034, Folder 007, 58-62.

<sup>150</sup> 939 F. 2d 727 (9th Cir. 1991).

<sup>151</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Jun. 4, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C06, Folder 006, 84

<sup>152</sup> Personal Note from Elena Kagan to Jack Quinn & Kathy Wallman (undated), William J. Clinton Presidential Library & Museum, WHC, Box C06, Folder 006, 2.

<sup>153</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Jun. 26, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C06, Folder 006, 31.

<sup>154</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Oct. 19, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C36, Folder 009, 2.

<sup>155</sup> 130 S. Ct. 827 (2010).

Kucana missed his asylum hearing, was ordered deported in absentia, and years later sought to reopen the case. The BIA refused, and Kucana sought judicial review in the Seventh Circuit, which held that it lacked jurisdiction to hear the petition.<sup>156</sup> At that point, the Bush Administration argued that the decision was vested solely within the discretion of the BIA and not subject to judicial review. When the case reached the Supreme Court during Kagan's tenure as Solicitor General, the government changed its position, arguing that the Seventh Circuit decision erroneously read the statute. The Supreme Court agreed that the decision was subject to judicial review and remanded the case for further proceedings.<sup>157</sup>

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<sup>156</sup> Kucana v. Mukasey, 533 F.3d 534 (7th Cir. 2008).

<sup>157</sup> *Id.*

## VII. FEDERALISM, EXECUTIVE POWER, & NATIONAL SECURITY

Various aspects of Kagan's scholarship, White House records, and Solicitor General record speak to issues of federalism, the scope of executive power, and the balance between national security and civil liberties. As in other areas of Kagan's record, her work mostly reflects institutional duties in her particular role, not her personal beliefs or judicial philosophy. Moreover, read at the distance of a decade or more, her policy conclusions and attendant scholarship during and immediately following the Clinton years seems particularly informed and defined by the political realities of that era. It is unclear the degree to which they are instructive as to her views of separation of powers in a post-9/11 world.

### Federalism

As Solicitor General, Kagan tended to support broad assertions of federal authority and to take positions that defend the federal government's ability to regulate traditionally state-controlled issue areas. While in the Clinton White House, she was very actively involved in staving off congressional Republicans' deregulatory proposals and challenges to agency authority. More specifically, Kagan has repeatedly taken positions defending the broad exercise of federal power by administrative agencies.

However, in a 1996 memo that stands in contrast to her other positions, Kagan supported upholding a Reagan Executive Order on Federalism (E.O. 12612 of October 26, 1987)<sup>158</sup> which advocated an extremely limited federal government and required federal agencies to conduct "federalism assessments" before enacting new policies.<sup>159</sup> In 1996, congressional Republicans were threatening to invalidate federal regulations, specifically on issues such as Medicaid, welfare, and environmental regulations, that did not comply with Reagan's Executive Order. Kagan was assigned the task of determining whether E.O. 12612 should be repealed. Kagan said she was "leery" of repealing the Executive Order and instead favored "trying to find a way to live with this EO rather than (now) to repeal it."<sup>160</sup> She did, however, express concern over the EO's burden on federal agencies and suggested thinking about ways in which agencies could comply with the EO in "as non-burdensome way [sic] as possible."

Kagan favored a course that protected agencies' ability to regulate when she participated in a discussion over a series of 1996 regulatory reform bills. In one memo, Kagan suggested amending a provision to allow for more agency discretion in interpreting authorizing statutes, stating that the current version of the reform bill would prohibit agencies from making reasonable interpretations of existing legislation.<sup>161</sup> In a series of memos to Jack Quinn and Kathy Wallman, Kagan argued against giving in too

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<sup>158</sup> Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

<sup>159</sup> Memorandum from Elena Kagan to Michael A. Fitzpatrick & Kumiki S. Gibson (June 26, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C24, Folder 005, 11.

<sup>160</sup> *Id.*

<sup>161</sup> Memorandum from Elena Kagan to Sally Katzen (Feb. 9, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C27, Folder 003, 93-94.

much to critics of the Administration's policies in pursuing regulatory reform legislation. Apparently she was concerned that compromise legislation would undermine the President's agenda and unnecessarily anger administrative agencies.<sup>162</sup> Written in the wake of these battles for agency control, Kagan wrote her landmark 2001 law review article "Presidential Administration," defending presidential control over administrative agencies.<sup>163</sup>

Kagan's White House records also reveal her response to the major federalism cases decided by the Supreme Court in the mid-1990s. Kagan described the U.S. Supreme Court's ruling in *Seminole Tribe of Florida v. Florida*,<sup>164</sup> as having "broad significance" in reshaping federalism jurisprudence.<sup>165</sup> The Seminole Tribe brought suit in federal court against the State of Florida, alleging that the state violated a federal statute by not engaging in good faith negotiations to create gaming compacts. The state argued that the statute violated the Eleventh Amendment right to sovereign immunity by mandating that the Tribe bring suit in federal court. The Supreme Court upheld the state's argument. Kagan, noting that the implications for Indian gaming were unclear, warned her White House colleagues of the ruling's broader implications: "[t]he Court's holding potentially affects any private suit brought against a State in federal court that alleges a violation of a statute enacted under Congress's Commerce Clause power."<sup>166</sup> Noting that the *Seminole Tribe* decision built on the line of reasoning in *United States v. Lopez*, Kagan asserted, "[t]he decisions will doubtless stand in the way of at least some citizen suits brought to enforce federal law" and "indicates a serious effort by a bare majority of the Court to reorient the balance of power between the federal government and the States. It is highly unlikely that this case will be the last one to pursue that states'-rights agenda."<sup>167</sup>

Kagan's record as Solicitor General is consistent with her rigorous defense of federal regulatory powers during her tenure in the Clinton White House. As Solicitor General, she has defended both the constitutional authority of the federal government to regulate, as well as argued for deference to administrative agency decisions. 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.<sup>168</sup> The statute was challenged as surpassing Congress's authority under the Necessary and Proper Clause. At oral argument, Kagan urged an

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<sup>162</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Feb. 13, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C27, Folder 006, 63-64; Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Feb. 14, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C27, Folder 006, 65-66; Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Feb. 28, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C27, Folder 006, 77-78.

<sup>163</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>164</sup> 517 U.S. 44 (1996).

<sup>165</sup> Memorandum from Elena Kagan to Harold Ickes (Mar. 31, 1996), William J. Clinton Presidential Library & Museum, WHC, Box C24, Folder 012, 2-4.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> 130 S. Ct. 1949 (2010).

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. At oral argument, Justice Scalia bluntly stated his opposition to this position: “this is a recipe for the federal government taking over everything.”<sup>169</sup> 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.<sup>170</sup>

In *Monsanto Co. v. Geertson Seed Farms*, Solicitor General Kagan defended an agency’s environmental review of a genetically modified plant and argued that the lower court should have deferred to the agency’s decision.<sup>171</sup> A group of farmers challenged the Animal and Plant Health Inspection Service (APHIS) decision to approve Roundup Ready alfalfa, a genetically modified plant, for introduction on the market without requiring Monsanto to prepare an Environmental Impact Statement (EIS) as provided by the National Environmental Policy Act (NEPA). The district court accepted the farmers’ argument that the Roundup Ready alfalfa would cross-pollinate and contaminate their crops, so it issued an injunction prohibiting the planting of the alfalfa until the EIS was completed. Appearing on behalf of APHIS when the case reached the Supreme Court, the Solicitor General’s Office argued that the ban eliminated consumer choice and infringed on the role of the federal regulatory agency. Instead, the Solicitor General’s brief argued, the court should have accepted the APHIS’s proposal to allow the alfalfa to be planted pending an EIS. The government’s position has been criticized by opponents of genetically modified food who fear it could result in weakened remedies available under NEPA.<sup>172</sup> The Supreme Court recently issued a decision that accepts Kagan’s arguments and allows for the genetically modified plants to be planted despite the fact that an EIS has not yet been prepared, and some farmers fear that the Roundup Ready alfalfa will ruin their crops and destroy the alfalfa export market.<sup>173</sup>

On the other hand, as a clerk for Justice Marshall, Kagan wrote a memo in 1988 that took an expansive view of NEPA’s EIS requirement.<sup>174</sup> Kagan argued that the Justice should vote to deny certiorari on two cases concerning the proper requirements of environmental impact statements under NEPA.<sup>175</sup> NEPA requires federal agencies to include in each EIS: (1) a mitigation plan, and (2) a failsafe procedure in case the available information is inadequate or too expensive to obtain. The Court of Appeals held that the statements must contain detailed mitigation plans and (in one of the cases

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<sup>169</sup> Transcript of Oral Argument at 20:4–20:5, *Comstock*, 130 S. Ct. 1949 (2010).

<sup>170</sup> 130 S. Ct. 1949 (2010).

<sup>171</sup> No. 09-475, 2010 WL 2471057 (U.S. June 21, 2010).

<sup>172</sup> 42 U.S.C. §§ 4321 *et seq.* (1970).

<sup>173</sup> No. 09-475, 2010 WL 2471057 (U.S. June 21, 2010).

<sup>174</sup> 42 U.S.C. §§ 4321 *et seq.* (1970).

<sup>175</sup> Memorandum from Elena Kagan to Justice Marshall re: *Robertson v. Methow Valley Citizens Council*, 87-1703, *Marsh v. Oregon National Resources Council*, 87-1704 (June 14, 1988).

consolidated in the action) a “worst case” scenario when the science is unclear on the precise environmental effects of the proposed action or the agency lacks adequate information. Kagan stated that the Court of Appeals’ decisions were “consistent with the language and purposes [of] NEPA.”<sup>176</sup>

Another memo written while clerking for Justice Marshall that provides a clue about Kagan’s views on federalism is a brief memo about the Full Faith and Credit Clause.<sup>177</sup> The case concerned a New York inmate who, during his incarceration, was married to a woman in Kansas by the proxy power of his attorney. However, the state prison refused to recognize the marriage or grant it the respective benefits under its Family Reunion Program. New York law deemed a life-sentenced individual as “civilly dead” therefore voiding any marital relationship that did not exist at the time of imprisonment. The petitioner argued that the Full Faith and Credit Clause required recognition of “a proxy marriage that is valid in the State where contracted as valid in New York.”<sup>178</sup> Kagan wrote that the petitioner’s position was “at least arguably correct.”<sup>179</sup>

## Executive Power

Kagan’s scholarship and statements suggest that she takes an expansive view of presidential power. In a law review article published in 2001,<sup>180</sup> she advocated for broad presidential control over administrative agencies: “I suggest . . . that most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving ultimate decision making authority in the hands of the President.”<sup>181</sup> This viewpoint seems to be consistent with her defense of the many administrative regulations enacted by President Clinton that were attacked by a Republican-controlled Congress. Advocates have looked to this article in an attempt to make guesswork at how she might rule on issues of executive power and national security in times of war or national emergency. However, it is important to bear in mind that the article was written following her work defending the Clinton Administration’s domestic policies and does not speak to the issues raised in a post-9/11 world.

Amidst the many examples of Kagan’s preference for a strong executive branch, she directly advocated for the President’s unencumbered removal powers with regard to the Commissioner of Patents and Trademarks. In a 1996 memo to Jack Quinn and Kathy Wallman, Kagan argued against an amended legislative provision that would require the

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<sup>176</sup> *Id.*

<sup>177</sup> Memorandum from Elena Kagan to Justice Marshall re: *Miner v. New York Dept. of Correctional Services*, 87-6947 (July 12, 1988).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>181</sup> *Id.* at 2320.

President to inform Congress of his reasons for removing the Commissioner.<sup>182</sup> In her memo, Kagan admitted to encouraging the Department of Justice to take a stance against this provision despite an acknowledgment that it “may not actually violate any rule of constitutional law.” Instead, Kagan endorsed the DOJ’s position because the reporting requirement would go against “policies that are deeply embedded in our constitutional structure.”<sup>183</sup>

In June 1996, Kagan authored a White House memo concerning the expansion of the Senate subpoena power over governmental officials.<sup>184</sup> Then-existing law protected federal officials acting in their official capacity from judicial enforcement of Senate subpoenas. The Senate proposed limiting this protection to instances where the “head of the department or agency . . . has directed the officer or employee not to comply with the subpoena . . . and identified the Executive Branch privilege or objection underlying such direction”—a proposal that Kagan feared would infringe on executive powers and disturb the separation of powers. Instead, she advocated for a modification to the proposed the exemption that would allow the Senate subpoena power to override personal, but not executive, privilege. She counseled supporting the narrower limitation of privilege in order to prevent the Senate from passing the stronger limitation, ensuring that executive privilege remained intact.

During the Whitewater investigations of President Clinton, Kagan’s position required her to develop legal theories responding to subpoenas issued by the Senate Whitewater Committee. Rather than trying to apply executive privilege, she focused on attorney-client privilege as a means of withholding Clinton’s documents from Senate review.<sup>185</sup> In handwritten notes from a conversation with Bob Lipshutz, Kagan wrote, “A-C privilege / not exec privilege” (emphasis in original).<sup>186</sup> This was the theory that the White House adopted: rather than claiming executive privilege to withhold the documents, the Administration argued that the lawyers provided advice to the President in both an official and a personal capacity, and that there was an inevitable confluence

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<sup>182</sup> Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Sept. 3, 1996), William J. Clinton Presidential Library & Museum, WHC Box C23, Folder 017, 30.

<sup>183</sup> Kagan’s espoused views on the removal power, however, seem to go against Supreme Court precedent. Although broadly defined in *Myers v. United States*, 272 U.S. 52 (1926), the removal power privilege has since been narrowed. Most notably, in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958), the Supreme Court held the President did *not* have limitless removal power over agencies that were “quasi-legislative” and not purely executive. In these instances, the Supreme Court held the President could not summarily remove the Commissioner of the Federal Trade Commission. Kagan’s affection for expansive Presidential removal powers seems to go against the Supreme Court’s prior decisions on the issue.

<sup>184</sup> Memorandum from Elena Kagan to Jack Quinn, Kathy Wallman & Jane Sherburne (June 14, 1996), William J. Clinton Presidential Library & Museum, WHC Box C08, Folder 003, 17-18. The initial impetus for the Senate bill had arisen in the wake of Oliver North’s Iran/Contra testimony and fears from the Senate that North would have claimed Congress did not have jurisdiction to subpoena a person acting in his “official capacity.” *Id.*

<sup>185</sup> Letter from Elena Kagan to Professor Geoffrey Hazard (Dec. 13, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C04, Folder 010, 136.

<sup>186</sup> Personal Note from Elena Kagan (undated), William J. Clinton Presidential Library & Museum, WHC, Box C04, Folder 010, 22.

between the Executive's roles that made it impossible to separate out private from public legal advice and communication. In a handwritten note, Kagan wrote, "the general proposition [is] that conversations between a President's White House Counsel and his private counsel can, in at least some circumstances, be privileged (under the attorney-client privilege)."<sup>187</sup> A typed statement from Lipshutz provided a further rationale for the privilege assertion, contending that the "right of confidentiality . . . allows our presidents to get the broadest range of advice from those whom he consults, in order to arrive at the best possible decisions for our nation." Kagan noted on the bottom of the statement in a handwritten exclamation, "Bob—wonderful! Elena."<sup>188</sup>

## National Security & Civil Liberties

Kagan's actions taken as Solicitor General concerning civil liberties and national security suggest that she is inclined to take a very expansive view of executive power in order to achieve national security objectives, although it is worth noting the decisions made in this area of the law have almost certainly involved administration officials beyond the Solicitor General. Nonetheless, it is worth exploring that the arguments put forth by the Solicitor General's Office. In her Solicitor General confirmation hearings, Kagan expressed a broad understanding of the Commander-in-Chief power when she suggested that persons detained as enemy combatants could be detained indefinitely for the remainder of the conflict (a "war without end") as long as there was a transparent process—affording some due process via an independent judiciary—to make the "enemy combatant" determination.<sup>189</sup> This level of due process is a far cry from the right to *habeas corpus*. However, while serving as Dean of Harvard law school, Kagan twice signed onto letters from law school deans arguing against restricting the right of *habeas corpus*.<sup>190</sup>

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.<sup>191</sup> 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

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<sup>187</sup> *Id.* at 124.

<sup>188</sup> Memorandum from Robert Lipshutz to Elena Kagan (Dec. 14, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C04, Folder 010, 43.

<sup>189</sup> *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 114 (2009), available at <http://judiciary.senate.gov/>.

<sup>190</sup> Statement of Law Deans (Jan. 15, 2007), Kagan Supreme Court Questionnaire (May 18, 2010), 12C; Letter from Elena Kagan, T. Alexander Aleinikoff, Harold Koh & Larry Kramer to Senator Patrick Leahy (Nov. 14, 2005), Kagan Supreme Court Questionnaire (May 18, 2010), 12C.

<sup>191</sup> 130 S. Ct. 1235 (2010) (mem.).

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.

Kagan also appeared before the Supreme Court in *Holder v. Humanitarian Law Project* to defend the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>192</sup> which prohibits providing material support to an entity designated by the Secretary of State as a “foreign terrorist organization,” against First Amendment and Due Process challenges.<sup>193</sup> 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 the statute could survive intermediate scrutiny because it 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 . . .”<sup>194</sup> Kagan also argued at oral argument that petitioners are free to engage in independent advocacy about ideas held by the groups, and they are free to communicate with groups, so long as they do not provide them with 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.”<sup>195</sup> 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 recently ruled in a 6 to 3 vote, that the statute’s prohibitions on

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<sup>192</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>193</sup> Nos. 08-1498, 08-89, 2010 WL 2471055 (U.S. June 21, 2010).

<sup>194</sup> Transcript of Oral Argument at 46, *Holder*, Nos. 08-1498, 09-89 (U.S. June 21, 2010).

<sup>195</sup> The Court’s recent decision essentially accepted Kagan’s proposal and limited its disposition to the present factual situation, declining to address “the resolution of more difficult cases that may arise under the statute in the future.” *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89, 2010 WL 2471055, at \*6 (U.S. June 21, 2010).

expert advice, training, service, and personnel were not vague and did not violate plaintiffs' speech or associational rights, a decision some view as limiting people's ability to provide training or information on issues such as peaceful conflict resolution and international human rights.<sup>196</sup>

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)<sup>197</sup> and whether a foreign official can be subject to civil liability. In *In re Terrorist Attacks on September 11, 2001*,<sup>198</sup> the Solicitor General's Office filed a brief opposing certiorari. 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 diplomatic rather than a legal solution. The Solicitor General's Office made a similar argument in *Samantar v. Yousuf*, a case involving a former high-ranking Somali official accused of overseeing torture and genocide.<sup>199</sup> 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.<sup>200</sup>

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. During her Solicitor General confirmation hearing, Kagan expressed favor toward continuing use of this privilege, stating, "I will work with the Attorney General and others at the Department of Justice and across the agencies to ensure that the United States invokes the state secrets privilege only in legally appropriate situations."<sup>201</sup> The Solicitor General's Office argued for an expansive reading of the state-secrets privilege before the Supreme Court in *Mohawk Industries v. Carpenter*,<sup>202</sup> a case that was actually about attorney-client privilege. The Solicitor General participated

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<sup>196</sup> Holder v. Humanitarian Law Project, Nos. 08-1498, 09-89 (U.S. June 21, 2010).

<sup>197</sup> 28 U.S.C. §§ 1330, 1602 *et seq.* (1976).

<sup>198</sup> 538 F.3d 71 (2d. Cir. 2008), *cert. denied sub nom.* Federal Ins. Co. v. Kingdom of Saudi Arabia, 129 S. Ct. 2859 (2009), *abrogated by* Samantar v. Yousuf, No. 08-1555, 2010 WL 2160785 (U.S. June 1, 2010).

<sup>199</sup> No. 08-1555, 2010 WL 2160785 (U.S. June 1, 2010).

<sup>200</sup> Samantar v. Yousuf, No. 08-1555, 2010 WL 2160785 (U.S. June 1, 2010).

<sup>201</sup> *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (Elena Kagan responses to written questions submitted by Sen. Patrick Leahy (D-VT), available at <http://judiciary.senate.gov/>

<sup>202</sup> 130 S. Ct. 599 (2009).

as uninvited amicus and included a section in its brief on the state-secrets privilege.<sup>203</sup> 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.

While serving as White House Counsel, Kagan expressed skepticism about the role of international tribunals. She made critical notes on a memo discussing whether the government should file an amicus brief in *Doe v. Karadzic*, a suit alleging damages for human rights violations during the Bosnian-Serb War.<sup>204</sup> In notes following the memo, she wrote in a somewhat ambiguous context: “judges shouldn’t be in the business of deciding who’s a war crim[inal].”<sup>205</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> Memorandum from Teresa Wynn Roseborough to Solicitor General Drew S. Days III (Aug. 1, 1995), William J. Clinton Presidential Library & Museum, WHC, Box C09, Folder 009, 5-19.

<sup>205</sup> *Id.* at 20.

## VIII. CORPORATE OVERSIGHT AND CONSUMER PROTECTION

Both during her time in the Clinton White House and as Solicitor General, Kagan has shown that she is unafraid of taking on powerful corporations. From negotiating with the tobacco companies, to defending the convictions of those convicted in the wake of the Enron scandal, to defending consumer protection laws, Kagan has played an active role in ensuring for corporate accountability.

During Kagan's tenure on the Domestic Policy Council, she contributed a great deal of her time to resolving the government's litigation with the tobacco industry concerning its advertising directed at children. In August 1998, Kagan authored two memos commenting on the legality of a settlement proposal.<sup>206</sup> Kagan argued that the settlement should be amended to provide more protection for tobacco farmers and ensure FDA jurisdiction over tobacco products.<sup>207</sup> In September 1998, Kagan argued in favor of negotiating with the tobacco industry, in part to bypass the possibility that Republican-dominated Congress would fashion legislation unfavorable to the Administration's agenda.<sup>208</sup> Kagan also noted that liberal Democrats may be displeased with the Administration's negotiations as being too conciliatory to the corporations' interests.<sup>209</sup> In November 1998, Kagan co-authored a memo with Bruce Reed reiterating her position that the Administration should negotiate with the tobacco industry, given the Department of Justice's position that it could not bring suit against the tobacco corporations.<sup>210</sup> Kagan commented that this approach "is our only way of doing something on tobacco without Congress."<sup>211</sup> She stressed, however, that the Administration should consult with "key players in Congress and the public health community" so as to "minimize political risk."<sup>212</sup> Kagan concluded that the Administration should not accept any settlement unless "it would advance [the Administration's] public health goals."<sup>213</sup>

In addition to pushing for a settlement with the tobacco companies, Kagan was also involved in pushing for legislation that would regulate tobacco. In March 1998, Kagan wrote a memo expressing positive comments about legislation introduced by Senator McCain (R-AZ), amending the FDA's jurisdiction over tobacco and

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<sup>206</sup> Memorandum from Elena Kagan & Bruce Reed to President Clinton (Aug. 22, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 053, Folder 003, 10-11; Memorandum from Elena Kagan to Erskine Bowles (Aug. 26, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 053, Folder 003, 6-7.

<sup>207</sup> Memorandum from Elena Kagan & Bruce Reed to President Clinton (Aug. 22, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 053, Folder 003, 10-11.

<sup>208</sup> Memorandum from Elena Kagan & Bruce Reed to Chief of Staff (Sept. 21, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 053, Folder 006, 59-61; Memorandum from Elena Kagan & Bruce Reed to President Clinton & Vice President Gore (Sept. 30, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 047, Folder 008, 50-51.

<sup>209</sup> *Id.*

<sup>210</sup> Memorandum from Elena Kagan & Bruce Reed to President Clinton & Vice President Gore (Nov. 16, 1998), William J. Clinton Presidential Library & Museum, WHORM, Box W001, Folder 009, 7-8.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

implementing liability provisions for the tobacco industry.<sup>214</sup> Kagan called the bill “a very positive development.”<sup>215</sup> She also co-authored a memo expressing the “broad consensus among [the President’s] advisors [that the Administration] aim for a strong, comprehensive bill that [would] meet[] our core public health objectives and that the industry would reluctantly swallow in the end.”<sup>216</sup>

More recently, the Solicitor General’s Office has handled many cases dealing with corporate accountability in industries beyond tobacco. In 2009, Solicitor General Kagan appeared before the Supreme Court to defend a key provision of the Sarbanes-Oxley Act,<sup>217</sup> which had established the Public Company Accounting Oversight Board (PCAOB), a board responsible for overseeing audits of public corporations subject to federal securities laws. PCAOB was created in the wake of the Enron and World Com scandals to increase corporate accountability. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>218</sup> an anti-tax group challenged the constitutionality of PCAOB as a violation of separation of powers. The group argued that because the President lacked sufficient oversight authority over the Board it was the equivalent of an unchecked “fourth branch” of government. Defending Sarbanes-Oxley against this conservative attack, Kagan argued 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 Paul Sarbanes (D-MD), 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.”<sup>219</sup> If the Court rejects the Solicitor General Office’s position, the Sarbanes-Oxley Act may be partially invalidated, resulting in less government oversight of corporations.

The Solicitor General’s Office also asked the Supreme Court to uphold the fraud convictions of Enron’s CEO in *Skilling v. United States*.<sup>220</sup> Jeff Skilling argued the “honest services” fraud statute under which he was convicted was unconstitutionally vague. Kagan defended the same statute against vagueness challenges in two other cases this term, *Black v. United States*<sup>221</sup> and *Weyhrauch v. United States*.<sup>222</sup> In a recent decision, the Court upheld the fraud statute but ruled that it only applied to bribery and kick-back schemes—neither of which were found to have been committed by Jeff Skilling. As a result, the Court remanded his case for further proceedings to determine whether the conviction could stand based on other charges.

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<sup>214</sup> Memorandum from Elena Kagan & Bruce Reed to President Clinton (Mar. 30, 1998), William J. Clinton Presidential Library & Museum, WHORM, Box W001, Folder 002, 3-7.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> 15 U.S.C. 7201 *et seq.* (2002).

<sup>218</sup> 08-861 (Dec. 7, 2009) (decision pending).

<sup>219</sup> Letter from Elena Kagan to Sen. Paul Sarbanes (June 17, 2002) (on file with the Senate Judiciary Committee).

<sup>220</sup> No. 08-1394, 2010 WL 2518587 (U.S. June 24, 2010).

<sup>221</sup> No. 08-876, 2010 WL 2518593 (U.S. June 24, 2010).

<sup>222</sup> No. 08-1196, 2010 WL 2518696 (U.S. June 24, 2010).

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*,<sup>223</sup> 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.<sup>224</sup> 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*,<sup>225</sup> 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.<sup>226</sup> On June 7, 2010, the Court, in an 8-1 decision, agreed with Kagan's position.<sup>227</sup>

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<sup>223</sup> 130 S. Ct. 1605 (2010).

<sup>224</sup> 15 U.S.C. 1692 *et seq.* (1977).

<sup>225</sup> No. 08-998, 2010 WL 2243704 (U.S. June 7, 2010).

<sup>226</sup> 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, 2010 WL 2400094 (U.S. June 17, 2009). In a recent 6-3 decision authored by Justice Thomas, the Court rejected the government's argument. *Id.*

<sup>227</sup> *Hamilton v. Lanning*, No. 08-998, 2010 WL 2243704 (U.S. June 7, 2010).

## IX. ACCESS TO JUSTICE AND LITIGATION REFORM

Kagan’s record reveals that she advocated on behalf of presidential administrations seeking to protect access to justice. While serving in the Clinton Administration, she was involved in efforts to stave off attempts by congressional Republicans to reform litigation rules that would limit access to justice. As Solicitor General for President Obama, she has defended a number of statutes that ensure litigants’ access to the courts.

The Solicitor General’s Office has advocated for plaintiff-friendly statute of limitations calculations in two cases during Kagan’s tenure. In *Merck & Co. v. Reynolds*, the Solicitor General’s Office was invited to submit an amicus brief and 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.<sup>228</sup> 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 and 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.<sup>229</sup> 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, taking the position that quality of representation and outcome were already included in the lodestar calculus.<sup>230</sup> 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.<sup>231</sup>

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.<sup>232</sup> The brief argued that an award of attorney’s fees under the Equal Access to Justice Act<sup>233</sup> belonged

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<sup>228</sup> 130 S. Ct. 1784 (2010).

<sup>229</sup> No. 08-974, 2010 WL 2025206 (U.S. May 24, 2010).

<sup>230</sup> 130 S. Ct. 1662 (2010).

<sup>231</sup> *Id.* at 1674.

<sup>232</sup> No. 08-1322, 2010 WL 2346547 (U.S. June 14, 2010).

<sup>233</sup> Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 (1980).

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 a unanimous opinion, the Court ruled that the award of attorney's fees is payable to the litigant, rather than the litigant's attorney.<sup>234</sup>

In *Hardt v. Reliance Standard Life Insurance Co.*, 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),<sup>235</sup> arguing that the court may, at its discretion, award attorney's fees to a claimant even if she does not ultimately prevail.<sup>236</sup> 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.<sup>237</sup>

## Preemption

During the Clinton Administration, Kagan worked on various legislative initiatives affecting access to justice and securities litigation. In 1994, Kagan was involved in White House efforts to counter the extremely conservative securities litigation reform bill proposed by the Republicans as part of their "Contract with America." It appears from Kagan's White House records that the Administration disagreed with the fundamental premise of Republican proposals to severely restrict plaintiffs' ability to bring securities litigation, but Clinton's advisors struggled to finesse the politics of their position. Clinton Administration officials considered various policy solutions, ranging from doing nothing to affirmatively articulating policy principles favored by the White House. For example, suggested proposals included encouraging alternative dispute resolution, barring secret settlements in cases implicating public health, and requiring insurance companies to report litigation data. A particular concern enunciated in Kagan's documents is the White House's fear of appearing to side with or favor trial lawyers. On the front of one memo outlining various proposals, Kagan wrote a note to her colleagues: "See esp. point 8. We may not agree but it's clear what the accountants are most concerned about is NOT our lack of support for them but rather that we'd side with the trial lawyers."<sup>238</sup> Point 8 suggested that the White House take no action and let the issue develop in Congress—a course of action Kagan apparently feared could lead to the perception that the White House "sided" with the trial lawyers. A note on a separate document, presumptively authored by Kagan, states: "Judges + states best

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<sup>234</sup> No. 08-1322, 2010 WL 2346547 (U.S. June 14, 2010).

<sup>235</sup> 29 U.S.C. 1001 *et seq.* (1974).

<sup>236</sup> No. 09-448, 2010 WL 2025127 (U.S. May 24, 2010).

<sup>237</sup> *Id.*

<sup>238</sup> Memorandum from Mark H. Gitenstein to Bruce Reed (Dec. 20, 1994), William J. Clinton Presidential Library & Museum, WHC, Box C20, Folder 001, 24.

to do this—frame this as an over-regulation issue . . . hit tactics of lawyers and things they use to drive up costs of litigation—paint as consumer v. business?”<sup>239</sup>

Kagan’s advice eventually prevailed over that of congressional Democrats and members of the White House economic team; Clinton vetoed the Private Securities Litigation Reform Act (PSLRA) of 1995 (and was subsequently overridden by Congress).<sup>240</sup> Recalling Kagan’s actions at the time, President Clinton praised Kagan’s tenacity in holding to her opinion that the PSLRA had a chilling effect on legitimate shareholder fraud claims because of its drastically heightened pleading and proof standards. “There she was, in her mid-30s starting out in her career, with the entire economic team, all of them against her position, and she . . . stood there and defended her conclusion,” Clinton said in a recent *New York Times* interview.<sup>241</sup> “It was very impressive. She was composed, direct and totally unfazed that all those guys wanted a different outcome.”<sup>242</sup>

Kagan’s files also reveal that, following the passage of the PSLRA, Kagan was engaged in monitoring its effects and evaluating subsequent proposed legislation concerning securities plaintiffs’ access to justice.<sup>243</sup> It appears from the files that Kagan was involved in White House conversations about amendments to the PSLRA offered in 1996 by Congresswoman Anna Eshoo (D-CA) that seem to have ultimately evolved into the Securities Litigation Uniform Standards Act of 1997.<sup>244</sup> The documents in Kagan’s files imply that the Administration did not want to significantly preempt state laws but was cognizant of the interests of Silicon Valley entrepreneurs who sought to remove class actions brought in plaintiff-friendly California state courts to federal courts. Notes in Kagan’s files also show some deference to the expressed wishes of the SEC to keep certain securities litigation within their purview in the federal courts and to clarify the “safe harbor” provisions of the PSLRA.<sup>245</sup>

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<sup>239</sup> Handwritten Note (undated), William J. Clinton Presidential Library & Museum, WHC, Box C20, Folder 001, 46-49.

<sup>240</sup> Pub. L. 104-67 [H.R. 1058], 109 Stat. 737 (1995).

<sup>241</sup> Carl Hulse, *Bill Clinton Speaks Out on Clinton*, N.Y. TIMES (June 19, 2010).

<sup>242</sup> *Id.*

<sup>243</sup> William J. Clinton Presidential Library & Museum, DPC, Box 055, Folders 019-020, *passim*; William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, *passim*.

<sup>244</sup> Memorandum from Congresswoman Eshoo et al. to Elena Kagan et al. (Mar. 14, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, 93-100.

<sup>245</sup> Paul Beckett, *Reform Rings Hollow for Firms Worried about Class-Action Suits*, WALL ST. J., Apr. 4, 1997, William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, 102; Scott McCartney, *AMR Unit’s Pilots Likely to Approve Tentative Contract*, WALL ST. J., Apr. 4, 1997, William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, 103; Memorandum from Elena Kagan to Jack Quinn et al. (Oct. 16, 1996), William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, 103-108; Memorandum from Ellen Seidman to Erskine Bowles (Jan. 16, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, 109-111; Handwritten Notes (Apr. 8, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 056, Folder 001, 101.

## Products Liability

During her tenure in the Clinton White House, Kagan also drafted several memos and edited various administrative action statements indicating a consumer-friendly position on products liability litigation reform. In March 1996, Kagan added language to a Presidential statement indicating that the President would only sign into law products liability reform legislation that protected the role of states and safeguarded consumers.<sup>246</sup> On April 22, 1996, Kagan authored a memo defending a strong veto statement and suggested that the Administration only soften a few phrases while leaving intact the President's objection to the elimination of joint liability for non-economic damages.<sup>247</sup> In April 1997, Bruce Lindsey authored a memo to the President (and noted that Kagan was the primary contributor to the memo) defending the President's veto of the 1996 products liability legislation and recommending that the Administration continue to take a strong stand on passing consumer-friendly products liability reform.<sup>248</sup>

Under Kagan, the Solicitor General's Office 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)<sup>249</sup> was intended to bar all design defect claims against vaccine manufacturers.<sup>250</sup> The government's amicus brief argued that prohibiting state court suits was necessary to avoid inhibiting innovation in vaccine design.<sup>251</sup> 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.*<sup>252</sup> There, the government argued that neither the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act)<sup>253</sup> nor the Federal Motor Vehicle Safety Standard (FMVSS) 208<sup>254</sup> preempted state tort law claims concerning defective automobile design and that states were free to set higher standards of safety for automobile construction.

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<sup>246</sup> Memorandum from Elena Kagan to Bruce Lindsey (Mar. 31, 1996), William J. Clinton Presidential Library & Museum, DPC, Box 070, Folder 004, 21.

<sup>247</sup> Memorandum from Elena Kagan to Jack Quinn et al. (Apr. 22, 1996), William J. Clinton Presidential Library & Museum, DPC, Box 070, Folder 004, 40-41.

<sup>248</sup> Memorandum from Bruce Lindsey to President William Clinton (Apr. 23, 1997), William J. Clinton Presidential Library & Museum, WHORM, Box W001, Folder 001, 3-7.

<sup>249</sup> 42 U.S.C. § 300aa-1 *et seq.* (1986).

<sup>250</sup> No. 08-1120 (Mar. 5, 2009) (decision pending).

<sup>251</sup> 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).

<sup>252</sup> No. 08-1314 (Apr. 22, 2009) (decision pending).

<sup>253</sup> 49 U.S.C. 30101 *et seq.* (1994).

<sup>254</sup> 49 C.F.R. § 571.208 (1989).

## X. LABOR

While Kagan worked on various labor policy issues in the Clinton Administration, there is very little in the documents that reflects her personal opinions about labor, and she has only argued one case with a significant impact on labor issues as Solicitor General. In reviewing her files, a handful of documents shed some light on her approach to labor issues. For instance, a 1997 Kagan-Reed memo addressed states' requests to privatize welfare functions and argued that welfare recipients employed by the state through workfare programs should be protected by federal labor laws including the minimum wage.<sup>255</sup> In an e-mail from May of that year, Kagan promoted an Administration compromise on workfare benefits that would exempt them from FICA and the Earned Income Tax Credit (EIC).<sup>256</sup> This compromise was suggested in the face a perceived threat that employers would not hire workfare participants if the employers were required to make FICA and EIC contributions.<sup>257</sup> She took a labor-friendly position in another note responding to a memo that discussed federal contractors' use of federal funds for the costs of resisting unionizing. On a copy of the memo Kagan wrote by hand, "I think everyone will agree that we shouldn't be reimbursing companies for the cost of union-busting activities."<sup>258</sup>

In May 1997, Kagan co-authored a memo in response to a request by the Secret Service Uniformed Division to unionize.<sup>259</sup> The Treasury Department argued that to do so would compromise national security by decreasing managerial authority over logistical matters, forcing disclosure of information during collective bargaining and potentially leading to unionization requests by more high-security officers. Kagan's memo criticized some of these concerns as "overstated," "subject to question," and not clearly showing a threat to national security.<sup>260</sup> However, the memo concludes by offering a "compromise proposal" to give the employees fewer collective bargaining rights than other unionized federal employees—a strategy that is consistent with Kagan's pattern of staking out the middle ground in order to push through policies.<sup>261</sup>

In another memo penned in March 1997, Kagan and Reed addressed a request by certain states to privatize some Medicaid and Food Stamp program functions in the wake of the 1996 Welfare Reform Act. Kagan and Reed argued that states should be allowed to contract with private entities for certain administrative functions, like interviewing applicants and information-gathering, but that eligibility determinations must continue to

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<sup>255</sup> Memorandum from Elena Kagan, Bruce Reed to President William Clinton (Mar. 27, 1997), William J. Clinton Presidential Library & Museum, WHORM, Box W003, Folder 026, 5-9.

<sup>256</sup> E-mail from Elena Kagan to Mark Mazur et al. (May 26, 1997), E-mail Composed, Box E003, Folder 002, 32.

<sup>257</sup> Lawton Chiles, Governor of Florida, had expressed a concern that employers in states would be unwilling to participate in the workfare program if they were required to make unemployment and FICA payments.

<sup>258</sup> Memorandum from Kathleen Wallman to Gene Sperling (Jan. 21, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 035, Folder 003, 33.

<sup>259</sup> Memorandum from Elena Kagan et al. to President William Clinton (May 14, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 035, Folder 008, 27.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

be made by public employees. The memo acknowledged that this approach would anger unions because of the displacement of some state workers.<sup>262</sup> A month later, Kagan and Reed wrote about the issue again, this time specifically addressing the state of Texas’s request to privatize. The memo states that the option favored by the DPC is to “draw the line at Texas,” allowing Texas to privatize limited functions, but prohibiting other states from doing so until it could be determined whether the “Texas experiment” was working. The memo says, “This option probably would give Texas enough to keep it from squawking, but would provoke fights with other states that want what Texas has gotten.”<sup>263</sup> Documents from late 1997 and into 1998 reveal the Administration denied requests from other states to privatize their welfare services.

As Solicitor General, Kagan defended the National Labor Relations Board in *New Process Steel v. NLRB*.<sup>264</sup> In a merits brief filed on behalf of the NLRB (Board), the Solicitor General’s Office argued that the National Labor Relations Act (NLRA)<sup>265</sup> authorized the Board to act with two out of five members present. Solicitor General Kagan based her reasoning on the NLRA’s statutory framework and legislative history, and contended that the NLRA allows the Board to delegate its powers to a group of three sitting members—for which a presence of two members constitutes a quorum—if the Board is facing vacancies. She also contended that the Court’s role in this litigation consisted of interpreting the NLRA, rather than judging the wisdom of Congress’s decision to enable two members to constitute a quorum. Justice Stevens, writing for a majority of five consisting of him and four conservative justices, rejected Solicitor General Kagan’s analysis and held that the NLRA requires a membership of three to issue binding decisions. As a result, outcomes in six hundred cases decided during the twenty-seven months when the Board had only two members may be in doubt.<sup>266</sup>

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*For more information, or for questions about this report, contact the Alliance for Justice,  
www.afj.org, 202.822.6070*

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<sup>262</sup> Memorandum from Elena Kagan & Bruce Reed to President William Clinton (Mar. 27, 1997), William J. Clinton Presidential Library & Museum, WHORM, Box W003, Folder 026, 5-9.

<sup>263</sup> Memorandum from Elena Kagan & Bruce Reed to President William Clinton (Apr. 25, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 064, Folder 001, 28.

<sup>264</sup> *New Process Steel v. NLRB*, No. 08-1457, 2010 WL 2400089 (U.S. Mar. 23, 2010).

<sup>265</sup> National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, 153(b) (1982).

<sup>266</sup> Peter Whoriskey & Sonja Ryst, *National Labor Relations Board Decisions were Illegal*, Supreme Court Rules, WASHINGTON POST, June 18, 2010.