

AFJ NOMINEE REPORT

GREGORY KATSAS



U.S. Court of Appeals for the D.C. Circuit

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INTRODUCTION

On September 7, 2017, President Trump nominated Deputy White House Counsel, Gregory G. Katsas, to serve on the United States Court of Appeals for the District of Columbia Circuit.

There is no doubt why the President nominated Katsas. There are countless seasoned Republican lawyers who would be qualified to sit on the D.C. Circuit, the nation's "second highest court." The reason for Katsas's nomination, however, appears to be his role as a Trump loyalist and a White House insider, who by his own account could have had a hand in almost all legal actions and decisions undertaken by the Trump Administration.

Indeed, Katsas describes his role as providing advice to the President and his staff "on virtually any legal issue of interest."¹ Given this fact, Katsas must demonstrate that he will be independent of the President who nominated him, and has an obligation to clarify his involvement crafting and implementing some of the most troubling actions taken by any President in history.

Katsas's career has also been defined by advocating for virtually unchecked executive power, trying to weaken civil rights laws, and working to eviscerate critical protections for the environment, workers, consumers and investors.

Alliance for Justice strongly opposes his confirmation to the District of Columbia Circuit.

BIOGRAPHY

Gregory Katsas graduated from Princeton University in 1986 and Harvard Law School in 1989. Katsas then clerked for Edward Becker on the U.S. Court of Appeals for the Third Circuit, and then for Clarence Thomas (first on the D.C. Circuit and then on the Supreme Court). After clerking, Katsas practiced law at Jones Day, where he became a partner in 1999. In 2001, he joined the U.S. Department of Justice, where he eventually became Assistant Attorney General for the Civil Division in 2008. Katsas returned to Jones Day in 2009 after the election of President Barack Obama.

Following President Trump's inauguration, Katsas joined the administration as Deputy Assistant and Deputy Counsel to the President. He currently serves in that role. Like other Trump nominees, Katsas has strong ties to the ultraconservative Federalist Society. He has been a member since 1989, and has spoken at Federalist Society events at least 53 times.²

¹ Sen. Comm. on the Jud., 115th Cong., Gregory George Katsas: Questionnaire for Judiciary Nominees, 33.

² Last year, Katsas received a \$1,000 honorarium from the Federalist Society. Since 2009 he has served on two Executive Committees of the Federalist Society. He was Vice Chair of the Federalist Society Litigation Practice Group from 1996-2001. He has also spoken before the Pacific Legal Foundation and the Heritage Foundation; See Sen. Comm. on the Jud., 115th Cong., Gregory George Katsas: Questionnaire for Judiciary Nominees, 5, 9-21, 56.

PARTICIPANT IN DONALD TRUMP'S ATTACKS ON THE RULE OF LAW

Since January 2017, Katsas has served as Deputy Assistant and Deputy Counsel to President Trump. Katsas describes his responsibilities as:

[P]roviding legal advice to senior staff in the White House Office, including the President and the Counsel to the President; managing legal issues involving executive-branch agencies; interviewing and recommending candidates for various executive and judicial appointments; and supervising approximately 15 Associate Counsels to the President.³

While Katsas's role in the administration is far-reaching, perhaps his most problematic commitment is his relationship with the President himself. In his Senate Judiciary Questionnaire, Katsas describes President Trump as his "principal client." In his post, Katsas "is often called on to provide advice to

[President Trump]," and "[t]he subject could be virtually any legal issue of interest..."

Since Katsas has admitted to having a potential hand in "virtually any legal issue of interest" in the Trump Administration, the inquiry into his fitness for office must be wide-ranging. Indeed, it is imperative that Katsas clarify for the Senate all matters he has worked on for the Trump Administration and his personal position on controversial issues.

This administration has repeatedly demonstrated its contempt for the rule of law by taking actions that courts have made clear are unconstitutional or that have raised serious questions regarding the administration's commitment to the Constitution. The Senate and the American people have a right to know if Katsas was involved in these matters, and if so, whether he supported such troubling actions. They have a right to know what actions, if any, he disavows. These are central questions if the Senate is to evaluate how Katsas will perform as a lifetime appointed judge on the second highest court in the country.

The following are examples of issues that Katsas should be called to address:

- He must disclose his involvement in the decision not to fire Michael Flynn, and to allow him to keep his security status, after Acting Attorney General Sally Yates briefed White House Counsel Don McGahn about Justice Department and FBI concerns that Flynn could be compromised by the Russians.

³ *Id.* at 33.

- He must disclose his involvement in the firing of Acting Attorney General Sally Yates.
- He must disclose his involvement in the investigation into President Trump's personal and campaign ties to Russia, including the President's decision to fire FBI Director James Comey. In the President's own words, he decided to fire Comey because of "this Russia thing," and "regardless of recommendation [he] was going to fire Comey."⁴ Was Katsas involved in such blatant efforts to impede a pending investigation?
- He must be asked about his involvement with the President's allusion, on Twitter, to the existence of "tapes" of his conversation with Comey, which appeared to be an attempt by the President to intimidate a government witness.⁵
- He must be asked about President Trump's unsubstantiated accusation against former President Obama, when he claimed, "How low has President Obama gone to tapp [sic] my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!"⁶
- He must be asked about the administration's response to reports regarding the meeting that took place at Trump Tower among Trump's sons, Trump's son-in-law, Trump's then-campaign manager, and a Russian lawyer.
- He must be asked about reports of repeated attempts by the members of the administration and the White House Counsel's office to avoid cooperating with the investigation being conducted by Special Counsel Robert Mueller.⁷
- He must disclose his involvement in the President's innumerable conflicts of interest, including whether he had any role in the President's decision not to fully divest himself of his business interests. By not divesting, President Trump has created conflicts of interest at home and abroad that potentially color his policy decisions.⁸ Since he has refused to disclose his tax returns, the full extent of the potential misconduct may never be known. Katsas, as a legal and policy advisor, must clarify whether he facilitates Trump's ability to pursue policy initiatives that also line the President's pockets. As Deputy White House Counsel, Katsas had the legal and ethical responsibility to advise the President against these activities. Yet as the list of conflicts grows, it is clear that Katsas has either failed in his duty or ignored it.
- He must disclose whether he participated in approving government and private flights for Cabinet officials

⁴ Donald Trump interview with Lester Holt, NBC NEWS (May 11, 2017), <https://www.nbcnews.com/nightly-news/video/pres-trump-s-extended-exclusive-interview-with-lester-holt-at-the-white-house-941854787582>.

⁵ Donald Trump (@realDonaldTrump), Twitter (May 12, 2017, 5:26 AM); see also Julia Manchester, *White House refers House panel to Trump's tweets about Comey 'tapes'*, THE HILL (June 11, 2017), <http://thehill.com/homenews/administration/339265-white-house-responds-to-house-panel-on-tapes-points-to-trumps-tweet>.

⁶ Donald Trump (@realDonaldTrump), Twitter (Mar. 4, 2017, 4:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529?lang=en>; see also <http://www.politico.com/story/2017/09/02/obama-trump-tower-wiretap-no-evidence-242284>.

⁷ Peter Baker and Kenneth P. Vogel, *Trump Lawyers Clash Over How Much to Cooperate with Russia Inquiry*, THE NEW YORK TIMES (Sept. 17, 2017), https://www.nytimes.com/2017/09/17/us/politics/trump-lawyers-white-house-russia-mcgnah-ty-cobb.html?_r=0.

⁸ Jeremy Venook, *Trump's Interests vs. America's, Dubai Edition*, THE ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/>.

at tremendous expense to taxpayers.

- He must be asked what role he played in ethics training and oversight of White House staff, given the significant and regular ethics problems that have arisen. These range from Kellyanne Conway's ethics violation hawking Ivanka Trump's products, to communications aide Dan Scavino's Hatch Act violation on social media, to Jared Kushner's repeated failure to submit complete and timely financial disclosures and security clearance information, among many others.
- He must be asked whether he supports President Trump's statements threatening freedom of the press as protected by the First Amendment.
- He must disclose his involvement in the President's pardon of Sheriff Joe Arpaio, whom a federal court had found in contempt of court after repeatedly violating the Constitution through discriminatory arrests.
- He must disclose his involvement with the discriminatory and unconstitutional travel ban.
- He must disclose his role in the unconstitutional order targeting "sanctuary cities" that don't assist the federal government in targeting immigrants.
- The President has repeatedly tweeted public, hostile messages to federal courts, questioned the ability of a federal judge to do his job because of his ancestry,⁹ and claimed he was

"absolutely" considering "breaking up" the Ninth Circuit as punishment for ruling against him.¹⁰ Katsas has served in the administration of a President who shows hostility to the federal judiciary. Does he share the President's contempt for independent federal judges who will check the administration when it violates the Constitution?

Such questions are entirely appropriate. When Harriet Miers, then White House Counsel, was nominated to the Supreme Court by President George W. Bush, Republicans insisted on detailed information regarding matters she worked on and policy positions she took. Senators Lindsey Graham and Sam Brownback "both spoke[] of the need to see Miers's White House memos."¹¹ According to conservative commentator Charles Krauthammer, Graham "demand[ed] privileged documents from Miers' White House tenure."¹² Senator Arlen Specter, too, "insisted that Miers must provide more information about her White House work, including a full accounting of which subjects she had worked on in the administration." When Miers refused to be forthcoming about her work in the White House, Specter emphasized that members of the Senate Judiciary Committee, of both parties, found her answers "inadequate," "insufficient" and "insulting."¹³

⁹ Nina Totenberg, *Who is Judge Gonzalo Curiel, The Man Trump Attacked For His Mexican Ancestry*, NPR (June 7, 2016), <http://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry>.

¹⁰ Sarah Westwood, *Exclusive interview: Trump 'absolutely' looking at breaking up 9th Circuit*, WASHINGTON EXAMINER (Apr. 26, 2017), <http://www.washingtonexaminer.com/trump-absolutely-looking-at-breaking-up-9th-circuit-court-of-appeals/article/2621379>.

¹¹ Charlie Savage, *Bush Says He Won't Air Memos from Miers*, BOSTON GLOBE (Oct. 25, 2005).

¹² Charles Krauthammer, *Miers: The Only Exit Strategy*, WASHINGTON POST (Oct. 21, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102001635.html>.

¹³ David D. Kirkpatrick, *Court Nominee is Asked to Redo Reply to Questions*, THE NEW YORK TIMES (Oct. 20, 2005), <http://www.nytimes.com/2005/10/20/politics/politicsspecial1/court-nominee-is-asked-to-redo-reply-to-questions.html>.

Also relevant is the hearing of then-White House Staff Secretary Brett Kavanaugh's nomination to the D.C. Circuit. Former Republican Judiciary Committee Chairman Arlen Specter asked him about his role in specific White House policies, and Kavanaugh answered.

Chairman Specter: Did you have anything to do with the issues of interrogation of prisoners relating to the allegations of torture in the so-called Bybee memorandum?

Mr. Kavanaugh: No, Mr. Chairman.

Chairman Specter: Did you have anything to do with the questions of rendition?

Mr. Kavanaugh: No, Mr. Chairman.

Chairman Specter: Did you have anything to do with the questions relating to detention of inmates at Guantanamo?

Mr. Kavanaugh: No, Mr. Chairman.

Chairman Specter: Did you have anything to do with Mr. Abramoff and the many visits which he apparently made to the White House?

Mr. Kavanaugh: No, Mr. Chairman.

Chairman Specter: Do you have anything to do with the President's policy on so-called signing statements?

Mr. Kavanaugh: Mr. Chairman, signing statements come through the Staff Secretary's Office, and I help ensure that relevant members of the administration

have provided input on the signing statements. In the first instance they're drafted in the Justice Department, but I do help clear those before the President sees them.¹⁴

As demonstrated by Specter's line of questioning and Kavanaugh's answers, it is clearly permissible to ask about a nominee's role in White House policies, and senators should feel free to pursue such a line of questioning with Katsas.

Finally, Katsas has made clear he "interview[ed] and recommend[ed] candidates for various executive and judicial appointments" to the President.¹⁵ Katsas should make clear which nominees he vetted, and if he shares certain views of the nominees. And, if he does not share those views, he must explain why he believed it was appropriate to nominate such individuals. To illustrate:

- Does he believe, like nominee Jeff Mateer, that transgender children are part of "Satan's plan?"
- Does he believe, like nominee Damien Schiff, that Justice Anthony Kennedy is a "judicial prostitute"?
- Does he believe, like now-Judge John Bush, that it's appropriate to propagate conspiracy theories that President Obama was born in Kenya?

Katsas's nomination is irreparably tainted by his role in the Trump Administration,

¹⁴ Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit Before the Sen. Comm. on the Jud., 109th Cong. (2006) (statement of Brett Kavanaugh), available at <https://www.congress.gov/109/chrq/shrg27916/CHRG-109shrg27916.htm>.

¹⁵ Katsas, *supra* note 1 at 33.

which has trampled ethical and legal norms with frightening consistency. Previously, when former White House staffers have been nominated to the federal bench, they have been questioned closely by Senate Judiciary Committee members of both parties about their involvement with controversial executive policies and actions. These questions must receive honest answers, not deflections. The Senate Judiciary Committee should vigorously question Gregory Katsas and call upon him to answer for his work.

LEGAL AND OTHER VIEWS

I. EXECUTIVE POWER AND CIVIL LIBERTIES

It is also concerning that Katsas has, throughout his career, demonstrated troubling views on executive power, raising serious doubts as to whether he will be an independent check on the President, particularly in the national security realm. In this context, again, Katsas must be asked about actions taken by the Trump Administration. As an example, we must know his involvement and his assumed support for the unconstitutional travel ban.

Moreover, Katsas served as a senior attorney at the Justice Department under President George W. Bush, and he played a central role in defending the Bush Administration's expansive views of executive power. As Elliot Minberg, a Senior Fellow at People For the American Way, wrote, Katsas has an "extensive record" in "advocating troubling assertions of

executive power," and "in five cases in which Katsas was personally involved, he pushed for positions that were rejected by the Supreme Court or by the D.C. Circuit as abuses of authority."¹⁶ In addition, in his role as a government attorney and also speaking in his private capacity, Katsas has repeatedly argued against fundamental liberties. For example, in response to questions submitted by Senator Edward Kennedy during his confirmation hearing for Assistant Attorney General, Katsas refused to say whether he believed waterboarding to be torture.¹⁷

In *Rasul v. Bush*, Katsas signed briefs arguing that federal courts lacked the jurisdiction to hear habeas petitions from foreign nationals held at Guantanamo Bay.¹⁸ The stakes were significant: if the government had prevailed, the President would have had the power to jail people suspected of terrorism with no possibility of real review by any court. The Supreme Court rejected the government's argument, finding that the prisoners were under the "complete jurisdiction and control" of the government, and therefore within federal court jurisdiction under the habeas statute.

Two years later, Katsas served as supporting counsel for the government in the *Hamdan v. Rumsfeld* case. *Hamdan*, like *Rasul*, involved the question of what process was due detainees at Guantanamo Bay: whether a military tribunal at Guantanamo that omitted human rights protections was sufficient process for a prisoner under U.S. and international

¹⁶ Elliot Minberg, *The Latest Chapter in Trump's Plan to Fill Our Courts with Judges Who Won't Stand Up to His Abuses of Power*, HUFFINGTON POST (Oct. 11, 2017), <https://www.huffingtonpost.com/entry/59de60fde4b075f45223a362>.

¹⁷ *Confirmation Hearing on Federal Appointments: Nomination of Gregory G. Katsas, of Massachusetts, Nominee to be Assistant Attorney General, Civil Division, Department of Justice Before the Sen. Comm. on the Jud.*, 110th Cong. 161-62 (2008).

¹⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

law.¹⁹ The Court again rejected the Bush Administration's plan, holding that the military tribunal at issue was insufficient, and therefore illegal.

In *Boumediene v. Bush*, which Katsas lists along with its sister case *Al Odah v. United States* as one of the ten most significant litigated matters of his career, the Supreme Court once again held that detainees at Guantanamo Bay were deprived of sufficient process. Katsas defended the constitutionality of the detention of a prisoner under the Military Commissions Act, which the government posited was an adequate substitute for the traditional habeas right. Again, the Supreme Court disagreed, striking down part of the statute. Justice Anthony Kennedy criticized Katsas's argument: "to hold that the political branches may switch the constitution on or off at will would lead to a regime in which [the executive branch], not this court, 'say what the law is'."²⁰

Katsas also argued two cases before the D.C. Circuit defending abuses of executive power. "In *Parhat v. Gates*, Katsas personally argued to the D.C. Circuit that a tribunal could brand a detainee who was not a member of a terrorist group as an 'enemy combatant' based on unreliable hearsay evidence, including claims from the Chinese government. And in *Bismullah v. Gates*, Katsas argued that the government should not have to disclose to detainees all the evidence against them, including evidence that suggested they were not in fact enemy combatants. In both of these cases, judges appointed by Republicans as well as Democrats unanimously rejected Katsas' claims."²¹

In 2008, Katsas was nominated to be Assistant

Attorney General for the Civil Division at the Justice Department. At the time, Senator Edward Kennedy expressly asked Katsas about his views on executive power:

The issue of habeas corpus is before the Court again in *Boumediene v. Bush*, which will be decided by the Supreme Court later this year. During oral argument in the D.C. Circuit on the rights of aliens held by the U.S. government outside the United States, a judge asked you point blank, "Are you saying they don't have any rights?" Reports indicate that you agreed. In addition, you testified before Congress last July that "extending habeas corpus to aliens abroad is both unnecessary and profoundly unwise."

In that same testimony, you defended the Combatant Status Review Tribunals used at Guantanamo, asserting that they provide greater procedural protections to detainees than have ever before been provided. Just a week earlier however, Lt. Col. Stephen Abraham had filed an affidavit in which he explained with insiders' knowledge the many ways in which these tribunals are fundamentally flawed and unjust.²²

In defending the tribunals, Katsas claimed that "[t]hey [] afford more rights than those deemed by the Supreme Court to be appropriate for American citizens detained as enemy combatants on American soil. And they afford more rights than those

¹⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²¹ Mincberg, *supra* note 16.

²² *Supra* note 17 at 151.

given for status determination under the Geneva Convention [sic].”²³ He elaborated that “[h]abeas review is also unnecessary.” As the *Boumediene* decision showed, the Supreme Court disagreed.

Kennedy went on to question Katsas about the *El-Masri* case. In [*El-Masri v. United States*, 479 F.3d 296 \(2007\)](#), the Bush Administration invoked the state secret privilege in a lawsuit brought by a former detainee from the CIA’s extraordinary rendition program, who had been released without being charged. In commenting on Katsas, who had argued the *El-Masri* case before the Fourth Circuit and assisted with the Supreme Court briefs, Senator Kennedy stated:

By all objective measures, this Administration has withheld more documents and more information from the American people than any in recent history, often on the flimsiest of legal and policy grounds. As *THE NEW YORK TIMES* noted in an editorial last December, “government secrecy has become [a] higher and darker art under the Bush administration.”

You’ve had a prominent role in litigation to protect the Administration’s claims of secrecy. In the most recent example, in *El-Masri v. Tenet*, you argued that the state secrets privilege prevented the court from considering the plaintiff’s well-documented claim that he was kidnapped by the CIA as part of its “extraordinary rendition” program and sent to Afghanistan to be tortured— all on the basis of mistaken identity. You said: “Just because some facts are in the public domain doesn’t eliminate the need to

keep others secret... Even disclosures to judges carry risk.”

You made similar arguments in other notable cases. In *Detroit Free Press v. Ashcroft* and *North Jersey Media Group, Inc. v. Ashcroft*, you defended the Attorney General’s decision to close post-9/11 “special interest” deportation hearings to the public and the press. In *Center for National Security Studies v. Department of Justice*, you defended the Department’s categorical refusal to disclose any information on hundreds of people detained in the wake of the 9/11 attacks.²⁴

In response to Senator Kennedy’s question, “is waterboarding torture, as defined by domestic and international law?” Katsas declined to answer, stating “[t]he Attorney General explained his view that it is inadvisable to address difficult legal questions in the absence of concrete facts and circumstances, particularly where any answer could reveal to our adversaries the contours of generally-worded laws that define the limits of a highly classified interrogation program.”²⁵

During Katsas’s confirmation hearing, Senator Sheldon Whitehouse also asked him whether the President may act against his own executive orders. Katsas responded:

With respect to the first statement on how a President can or can’t change executive orders, it seems to me literally true in a sense because the

²³ *Upholding the Principle of Habeas Corpus Hearing Before the H. Comm. on Armed Services*, 110th Cong. 69–70 (2007) (Statement of Gregory G. Katsas).

²⁴ *Supra* note 17 at 154-55.
²⁵ *Id.* at 161.

Constitution doesn't specify procedures for making or sending executive orders in a way that, say, it specifies the procedures for making and rescinding statutes. To that extent, it's true.²⁶

Katsas also testified before the House Judiciary Committee in an effort to refute claims that the United States' inhumane treatment of detainees at Guantanamo was a recruitment tool for terrorists. He said:

The notion that if we ratchet up the protections at Guantanamo Bay with respect to combatant status review tribunal procedures, military commission prosecutions, how we treat the individuals there, the notion that incrementally improving the procedures would cause Al-Qaeda to just wither away and say "Well, that is fine, never mind, we will stop," seems to me fanciful...we have exceeded historical norms for the conduct of the war..."²⁷

Katsas's views stand in stark contrast to those of military and intelligence leaders. For example, Admiral Mike Mullen said that Guantanamo Bay "has been a symbol, and one which has been a recruiting symbol for those extremists and jihadists who would fight us."²⁸ Dennis Blair, Director of National Intelligence, testified that "the detention center at Guantanamo has become a damaging symbol to the world and it must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security."²⁹

²⁶ *Id.* at 109.

²⁷ *Habeas Corpus and Detentions at Guantanamo Bay Hearing Before the H. Comm. on the Jud.*, 110th Cong. 113 (2007).

²⁸ HUMAN RIGHTS FIRST, *Al Qaeda and Isis Use of Guantanamo Bay Prison in Propoganda and Materials* (Sept. 2017), <http://www.humanrightsfirst.org/sites/default/files/AQ-ISIS-Propaganda-Use-of-Gitmo-Issue-Brief.pdf>.

²⁹ *Hearing on the Nomination of Admiral Dennis Blair Before the S. Select Comm. on Intelligence*, 111th Cong. (2009) (Statement of Dennis Blair), https://www.dni.gov/files/documents/Newsroom/Testimonies/20090122_testimony.pdf.

It is clear that Katsas has a dangerously expansive view of executive powers and a limited view of civil liberties. These views are disturbing in light of his ambitions to serve in the branch that will be in part responsible for checking the power of President Trump.

II. SUPPORTS WEAKENING CRITICAL LEGAL PROTECTIONS

There are also serious questions regarding whether Katsas will give proper effect to some of our most important laws.

A. WORK WITH THE TRUMP ADMINISTRATION IN ERODING LEGAL PROTECTIONS

The D.C. Circuit plays a central role in reviewing and enforcing critical legal protections that ensure civil rights, worker rights, a clean and safe environment, and consumer and investor protections. Yet, while working in the Trump Administration, Katsas has been a leader in trying to curtail regulatory protections for Americans.

As *Time* noted, "White House counsel Don McGahn has assembled a team of elite lawyers with the stated goal of leading Trump Administration efforts to roll back regulatory powers across the U.S. government." McGahn, referencing attorneys, including Katsas, bragged that "[t]hey understand regulatory agencies, several are appellate lawyers who have spent their careers fighting regulatory and government overreach"³⁰

As noted above, Katsas has stated that

³⁰ Zeke J. Miller, *President Trump's Lawyers Plan a White House Legal Attack on Federal Agency Power*, TIME (Mar. 13, 2017), <http://time.com/4700311/donald-trump-white-house-counsel-steve-bannon/>.

in his role in the Trump White House he “manag[es] legal issues involving executive-branch agencies.” In this context, Katsas again has a duty to tell the Committee what matters he specifically worked on for the administration. For example, was he involved in decisions by the EPA that weakened environmental enforcement? Was he involved with efforts to sabotage the Affordable Care Act?

In the civil rights context alone, here are just a few examples of areas in which more clarity is required of Katsas:

- He must disclose his role in the administration’s erosion of critical rights to contraceptive coverage for women across the country.
- He must disclose his role in repeated efforts by the administration to undermine LGBTQ rights. This administration has taken multiple retrograde and dangerous stances toward the LGBTQ community. For example, without warning, the President announced on Twitter a ban of transgender people serving in the military. The Department of Justice reversed its prior position that Title VII protects transgender Americans from discrimination in the workplace. The Department is also fighting the Equal Employment Opportunity Commission in federal court, arguing that civil rights laws do not protect gay workers from discrimination. The Department of Education reversed guidelines aimed at protecting transgender students at school.
- He must disclose his role in efforts by the administration to undermine the right to vote. For example, the administration took

the extraordinary step of withdrawing the Justice Department’s position, already fully litigated, that Texas had adopted a voter ID law for racially discriminatory reasons. Moreover, the administration sided with Ohio’s voter purge program designed to make it more difficult for people of color to vote. And, Katsas must address whether he was involved with the Presidential Advisory Commission on Election Integrity, which has focused its attention on suppressing the right to vote.

- He must disclose his role in the Department of Education’s decision to weaken Title IX protections.

B. HOSTILITY TO LEGAL PROTECTIONS THROUGHOUT HIS CAREER

Katsas’s hostility toward regulatory protections for many vulnerable groups can be seen in both his personal statements and career choices.

LGBTQ Rights

In addition to his current role in supporting President Trump’s erosion of LGBTQ rights, it is telling that he strongly opposed [*Obergefell v. Hodges*](#). In describing the 2014 Supreme Court term as “grim” and “a very bad year for conservatives,” he specifically highlighted the Court’s decision in *Obergefell*.³¹

Moreover, while he was at the Department of Justice Katsas defended the Defense of Marriage Act (DOMA). Between 2004 and

³¹ Denise M. Champagne, *Conservatives take a hit in latest Supreme Court Term*, THE DAILY RECORD OF ROCHESTER (July, 17, 2015).

2006, Katsas served as counsel in two different cases attempting to uphold the statute – in [*In re Kandu*, 315 B.R. 123 \(Bankr. W.D. Wash. 2004\)](#), debtors argued that DOMA was unconstitutional as applied to the bankruptcy statute since it excluded same-sex couples from filing jointly; and in [*Smelt v. Orange County*, 447 F.3d 673 \(9th Cir. 2006\)](#), plaintiffs were denied marriage licenses because they were of the same sex. In both cases, Katsas successfully argued that the couples should be deprived of the benefits of marriage.

While speaking before the Federalist Society in 2011, Katsas described his efforts to protect DOMA in an event titled “Defending the Defense of Marriage Act.”³² Katsas was highly critical of the Obama Administration’s decision not to defend the legality of DOMA. When discussing whether it was possible to uphold DOMA under rational basis review, Katsas argued:

What’s a legitimate government interest to which DOMA is rationally related? Well start with the interest in facilitating the ideal relationships for having and rearing children. It is biologically undeniable that only opposite-sex unions can easily produce children, and it seems to me pretty self-evident, but at least a debatable point, that the other things equal the best arrangement for a child is to be raised by both of the child’s biological parents which by definition have to be one man and one woman.

During the event, Katsas repeatedly referred to this proposition as “seemingly self-evident.” He also criticized the Obama Administration for “explicitly abandoning” this argument as a way

to protect DOMA, claiming their actions were “somewhat shameful.” In the same speech, Katsas cited statistics showing that the number of children born out of wedlock in Scandinavia “skyrocketed” after same-sex marriage was allowed.

Later, while working as a private attorney, Katsas criticized the arguments of litigants opposed to the California referendum barring same-sex marriage, Proposition 8.³³

Reproductive Rights

During his time in the Bush Administration, Katsas litigated multiple cases where the government attempted to limit the rights of women.

First, Katsas defended the “Mexico City Policy,” also known as the “global gag rule,” by which the U.S. government required foreign organizations that received federal funds to neither promote nor perform abortions.³⁴

Katsas also served as counsel in [*Britell v. United States*, 372 F.3d 1370 \(Fed. Cir. 2004\)](#), a case where a woman sought reimbursement from her health insurer for the cost of an abortion of an anencephalic fetus but was denied because a statute and corresponding regulations prevented funds available to the Department of Defense from being used to perform an abortion, except where the life of the mother would be endangered. Anencephaly is a condition where a fetus is missing a major portion of its brain, and the only prognosis for the condition

³² Gregory Katsas, *Defending the Defense of Marriage Act*, Federalist Society for Law & Public Policy Studies, Indianapolis, Indiana (Aug. 18, 2011).

³³ See Chris McGreal, *Supreme Court Gay Marriage Hearings: DOMA and Proposition 8 Go On Trial*, THE GUARDIAN (Mar. 25, 2013).

³⁴ See *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2nd Cir. 2002).

is death. The government appealed a district court ruling for the woman. The district court found that since there can be no basis for the state's interest in "potential human life" for anencephalic fetuses, there can be no rational basis for the ban on that specific abortion procedure, and therefore no legal ground to deny the reimbursement. However, the Second Circuit agreed with the government and reversed.

In a related case, Katsas represented the government when the Department of Defense was sued by a military spouse who sought health coverage for an abortion for her anencephalic pregnancy. Again, there was no chance that the fetus would become a viable and healthy child, but the government sought to deny the funding of the procedure. This case, [*Doe v. United States*, 372 F.3d 1308 \(Fed. Cir. 2004\)](#), which appeared before the United States Court of Appeals for the Federal Circuit, was transferred to the Ninth Circuit, where the court reversed the decision of the district court and denied the reimbursement.

Undermining Health Care for Millions

While in private practice, Katsas represented the National Federation of Independent Business (NFIB), where he is a member of the Advisory Board, in its challenge to the Affordable Care Act in [*National Federation of Independent Business v. Sebelius*](#). He claimed that Americans' liberty was "profoundly threatened" by the Act.³⁵

Had Katsas been successful, millions of Americans would have lost health insurance and critical protections against insurance companies would have been eviscerated.

³⁵ Jane Norman, *Health Care Law 'Harmful' for the Uninsured but Aids Insurers*, *NFIB Tells High Court*, CONGRESSIONAL QUARTERLY HEALTHBEAT (Feb. 6, 2012).

Equal Pay

Katsas described the majority decision in the [*Wal-mart v. Dukes*](#) case, in which the Supreme Court refused to certify a nationwide class of female Walmart employees who had alleged workplace discrimination, as "incredibly easy on the facts."³⁶ He has also described that case as a "nice win for business."³⁷ Agreeing with Justice Antonin Scalia, Katsas summarized the case by saying there "has to be a common fact that materially advances the litigation, and in this kind of case there really was none." Because of the decision that he praised, it is harder for women to hold businesses accountable when they are denied their rights under the law.

Pleading Standards

Katsas has been extremely supportive of heightened pleading standards created by the Supreme Court in [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 \(2007\)](#) and [*Ashcroft v. Iqbal*, 556 U.S. 662 \(2009\)](#). In a prepared statement before the House Judiciary Committee, Katsas wrote that the decisions prevented "the threat posed by baseless litigation..."³⁸

Moreover, he posited that the heightened standards have had "at most a negligible impact" on motions to dismiss and rejected the idea that *Twombly* and *Iqbal* have imposed unfair burdens on civil rights plaintiffs.³⁹ However, a 2011 report by the Federal Judicial Center found the share of

³⁶ Gregory Katsas, *Supreme Court Roundup* before the Federalist Society for Law & Public Policy Studies, Winston Salem, North Carolina (Nov. 3, 2011).

³⁷ *Many Business Wins in Last Supreme Court Term*, METROPOLITAN CORP. COUNS., Sept. 2013.

³⁸ See *Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Jud.*, 111th Cong. 19, 25 (2009).

³⁹ See *id.* at 93–95.

filed lawsuits that face 12(b)(6) motions overall increased substantially after *Iqbal*.⁴⁰ Even more troubling, a 2015 study published in the Virginia Law Review found that individual employment discrimination and civil rights cases had been particularly impacted, increasing the already stark inequality in the judicial system between individual and corporate plaintiffs.⁴¹ Katsas’s personal views clearly favor limiting corporate liability over the right of victims to have their cases fairly adjudicated.

Torture Victims

In his personal capacity Katsas has criticized the Torture Victim Protection Act (TVPA).⁴² In speaking about *Mohamad v. Palestinian Authority* while at Jones Day, Katsas claimed:

It doesn’t sound like a business case, but there has been an unfortunate development in recent years of human rights groups using statutes like the TVPA and the Alien Tort Statute to sue American businesses that do business in underdeveloped countries abroad for alleged complicity in human rights violations.

Katsas went on to describe his hope for future litigation:

And there is a related case now pending in the Supreme Court, the *Kiobel* case, which we are hoping will shut down such lawsuits under the Alien Tort Statute by holding that the statute doesn’t apply to businesses, or that it doesn’t apply

outside the United States, or that it doesn’t apply to aiding and abetting, which is the usual theory that these groups bring against business defendants.

The Supreme Court later did limit the Alien Tort Statute from aiding-and-abetting liability in the *Kiobel* case – a decision that Katsas praised.⁴³

Fair Housing Act

In 2015, as noted, Katsas described the 2014 Supreme Court term as “grim” and a “very bad year for conservatives.”⁴⁴ In addition to *Obergefell* and *Sebelius*, Katsas highlighted the Court’s decision in [Texas Department of Housing and Community Affairs v. The Inclusive Communities Project](#), which upheld disparate impact claims under the Fair Housing Act (FHA), and especially criticized Justice Kennedy’s opinion — “a very schizophrenic opinion.”⁴⁵

In *Inclusive Communities Project*, the Supreme Court upheld 45 years of legal precedent, including rulings by 11 different federal courts of appeals. The Court acknowledged the country’s commitment to equal treatment under the law and confirmed that equal opportunity in housing was critical. As the Court held, “[the] FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one black, one white – separate and un-equal.’” The Court acknowledged “the Fair Housing Act’s continuing role in

40 Jonah Gelbach, *Measuring Twombly and Iqbal’s Impact on Access to Courts: An Economic Model*, ACSBLOG (Dec. 21, 2011), <https://www.acslaw.org/acsblog/measuring-twombly-and-iqbal%E2%80%99s-impact-on-access-to-the-courts-an-economic-model>.

41 See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2154–55 (2015).

42 *Jones Day: Suing the Federal Government on ACA and More*, METROPOLITAN CORPORATE COUNSEL (Sept. 2012).

43 *Many Business Wins in Last Supreme Court Term*, METROPOLITAN CORP. COUNS., Sept. 2013.

44 Champagne, *supra* note 31.

45 Champagne, *supra* note 31.

moving the Nation toward a more integrated society.”⁴⁶

The disparate impact standard affirmed by the Court is one of the Fair Housing Act’s key enforcement tools. It prohibits any housing policy that unfairly excludes people on the basis of race, color, religion, national origin, gender, disability, or family status when the policy is unnecessary to serve legitimate interests, even if it seems neutral on its face. This standard has long proven essential in preventing discriminatory practices. For example, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* itself, a Dallas civil rights organization used disparate impact to challenge Texas’s policy of exclusively placing low-income housing in African-American neighborhoods, thereby reinforcing existing racial segregation.

The fact that Katsas was so critical of a decision that affirmed 45 years of precedent and 11 court of appeals rulings, and is essential to fighting housing discrimination, is extremely troubling.

III. CRIMINAL JUSTICE

In praising Justice Clarence Thomas, Katsas has highlighted a number of Thomas’s opinions on criminal justice issues from his first term. Describing Thomas’s views on these cases, Katsas said, “[Thomas] was dead right in every one of those votes.”⁴⁷ These cases include: *Dawson v. Delaware*, where Thomas was the sole dissent from an opinion that barred the state from introducing bad character evidence at trial that had no relevance to the case;⁴⁸ *Hudson v. McMillan*, where Thomas was one of

two dissenting votes from an opinion that held that prison guards using excessive force against prisoners constitutes cruel and unusual punishment;⁴⁹ and *Foucha v. Louisiana*, where Thomas dissented from the decision that a person found not guilty by reason of insanity cannot be held indefinitely on the grounds of “potential dangerousness” once no mental illness is present.⁵⁰

Katsas also praised Thomas’s plurality opinion in [Wright v. West, 505 U.S. 277 \(1992\)](#).⁵¹ *Wright* held that a prisoner’s state conviction for larceny based solely on possession of stolen goods did not violate his right to due process. While the Court in *Wright* split into five separate opinions, Thomas’s opinion suggested an extremely limited role for federal courts in protecting constitutional rights under habeas corpus review, something praised by Katsas.

In a speech before the Federalist Society in 2011, Katsas criticized the Supreme Court’s “shocking” decision in [Brown vs. Plata, 563 U.S. 493 \(2011\)](#).⁵² In *Plata*, the Supreme Court held that the Eighth Amendment required a population limit in California prisons to ensure humane treatment of the prisoners. Katsas quoted Justice Scalia in claiming that Justice Kennedy affirmed the “most radical injunction in American history.” In criticizing the decision, Katsas described the case as follows:

Ostensibly based on the Eighth Amendment right to receive healthcare in prison, not a lot of legal reasoning in the opinion [sic]. There’s

⁴⁶ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

⁴⁷ Gregory Katsas, *Teleforum: 25 years of Justice Thomas*, Federalist Society for Law & Public Policy Studies, Washington, District of Columbia (June 28, 2016).

⁴⁸ *Dawson v. Delaware*, 503 U.S. 159 (1992).

⁴⁹ *Hudson v. McMillan*, 503 U.S. 1 (1992).

⁵⁰ *Foucha v. Louisiana*, 504 U.S. 71 (1992).

⁵¹ Gregory Katsas, *Justice Thomas: 25 Years Later*, REAL CLEAR POL. (July 2, 2016).

⁵² Gregory Katsas, *Supreme Court Roundup before the Federalist Society for Law & Public Policy Studies*, Winston Salem, North Carolina (Nov. 3, 2011).

generally a lot of rhetoric about the need to remedy constitutional violations. There's no discussion of the limits on federal or other equitable power. There's a lot of rhetoric about the human dignity of the prisoners. There's precious little rhetoric about the human dignity of the past or future victims of those people.⁵³

CONCLUSION

Gregory Katsas's career is defined by his work in Republican administrations, and most recently by his work for President Trump. It is our view that officials who have actively supported an administration that disregards ethical and legal norms are unfit to serve lifetime appointments in the federal judiciary, especially those officials whose charge wholly or partially included the responsibility to ensure the administration always acts within constitutional, legal and ethical constraints. If Katsas is confirmed, he may be faced with issues on the D.C. Circuit that he has worked on for President Trump. Until the exact extent of Katsas's involvement in the policies of and controversy surrounding the President is known, and Katsas demonstrates his independence through disavowing the administration's repeated attacks on the rule of law, Katsas cannot be confirmed. The Alliance for Justice strongly opposes the confirmation of Gregory Katsas to the District of Columbia Circuit.

⁵³ *Id.*