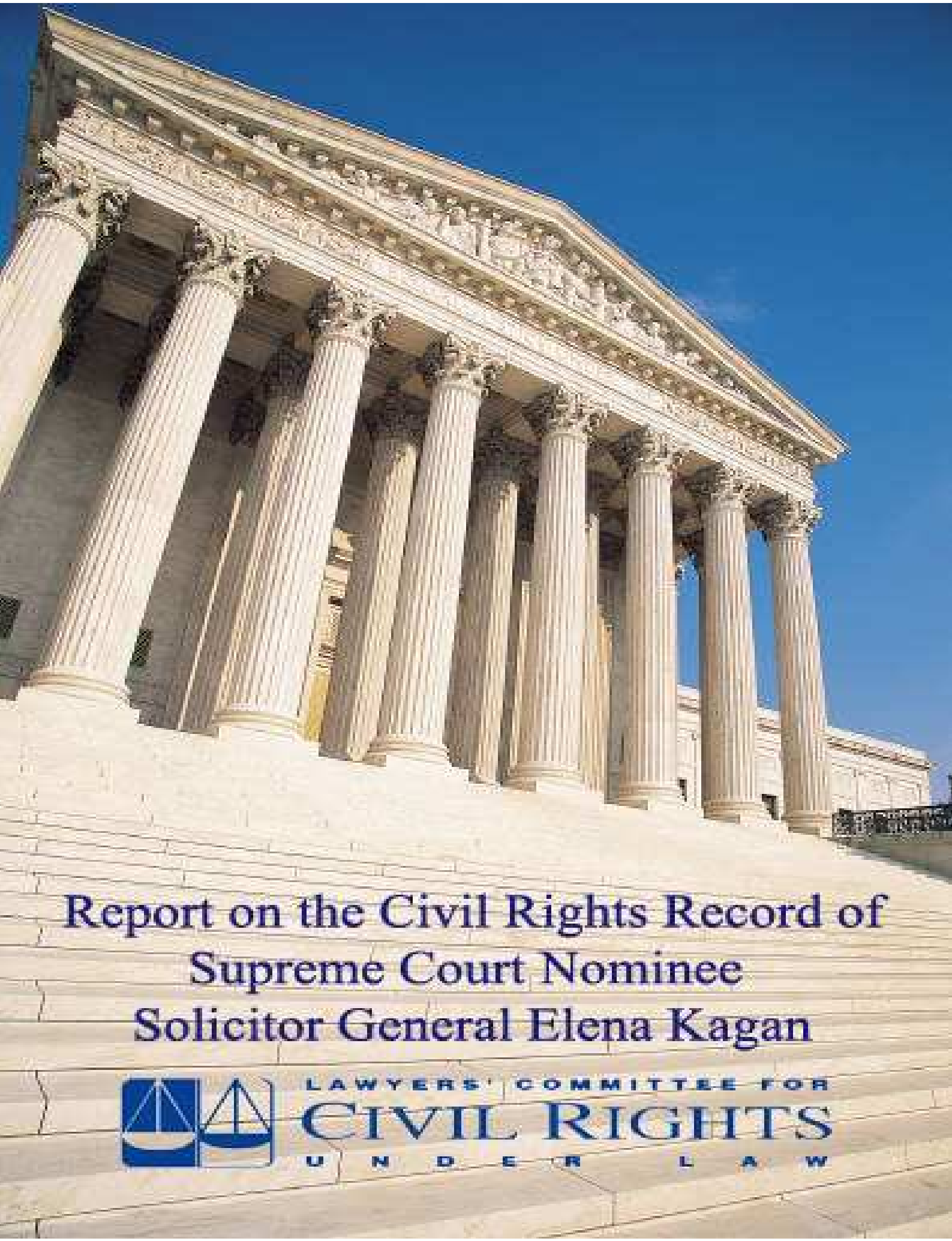

Report on the Civil Rights Record of Supreme Court Nominee Solicitor General Elena Kagan

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

I. EXECUTIVE SUMMARY

General Kagan's Nomination

On May 10, 2010, President Barack Obama nominated Solicitor General Elena Kagan to the Supreme Court of the United States, to replace retiring Justice John Paul Stevens. During his tenure on the Court, Justice Stevens was known as a reliable and critical voice for strong and broad interpretations of our nation's Constitution and civil rights laws. The next Associate Justice of the Court will need to step into this role if the Court is to uphold the rights of our nation's most vulnerable and excluded citizens—rights that the Lawyers' Committee for Civil Rights Under Law is dedicated to defending.

The last vacancy on the Court occurred in 2009, when Justice David Souter retired and Justice Sonia Sotomayor was named to his seat. If confirmed, General Kagan would be the fourth female justice in the 219 year history of the Supreme Court. (At present, of the 1,010 federal circuit and district court judges, including senior judges, 249 are women.)

General Kagan began her legal career as a law clerk on the D.C. Circuit and the Supreme Court, then worked as a corporate litigator, law professor, Associate Counsel to President Bill Clinton, and then Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council, before returning to academia, first as a law professor and then as Dean of the Harvard Law School. She was nominated as Solicitor General on January 5, 2009 and confirmed in March of that year. Unlike all of the other Justices currently serving on the Supreme Court, General Kagan has never served as a judge.[1] In announcing his nominee, President Obama described General Kagan as "as one of the nation's foremost legal minds" and referred to her "lifelong commitment to public service and [her] firm grasp of the nexus and boundaries between our three branches of government."

The Lawyers' Committee's Policy Regarding Nominations To The Supreme Court

Since its creation in 1963 at the urging of President John F. Kennedy, the Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States. Over the course of this near half-century, our nation has been transformed as we have taken important strides in confronting racial discrimination and injustice. Yet the challenges of unlawful discrimination remain and continue to obstruct and undermine the principle of equal justice for all.

Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights enforcement plays in our democracy, the Lawyers' Committee has long reviewed the records of nominees to the Supreme Court to see if the nominee has demonstrated views that are hostile to the core civil rights principles for which the Lawyers' Committee has advocated. Based on such a review, the Lawyers' Committee has opposed nominees in very few instances. Beginning with its 2009 report on now-Justice Sotomayor, the Lawyers' Committee

[1] Historically, the Supreme Court has typically had one or more members who had not previously served as judges. The Roberts Court as it existed until Justice Stevens' retirement was the exception, not the rule, in that its members all had prior service on the bench.

also undertook to consider whether to affirmatively support a nominee by evaluating whether the nominee's record "demonstrates that the nominee possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws."

The Lawyers' Committee Review of General Kagan's Record

The Lawyers' Committee reviewed materials from a variety of sources in order to assess General Kagan's nomination under its exacting standard for support. In particular, we have reviewed the following documents:

- Kagan's legal writings, including her signed, published law journal articles and her unsigned student note published in the Harvard Law Review;
- Briefs relating to civil rights issues that Kagan signed as Solicitor General, including briefs as *amicus curiae*;
- From the approximately 167,000 pages of documents, including emails, released by the William J. Clinton Presidential Library & Museum, all such documents which either were included in folders relating to civil rights issues or used terms relating to civil rights issues.

We also have consulted a variety of sources concerning General Kagan's work in the Clinton Administration and her service as Dean of Harvard Law School. Finally, representatives of the Lawyers' Committee attended the hearings held by the Senate Judiciary Committee from June 29th to July 1st to seek additional insight into the nominee's views on constitutional interpretation and the application of our nation's civil rights laws.

As reflected in its policy concerning nominations to the Supreme Court, the Lawyers' Committee is primarily concerned with understanding how a nominee would likely deal with issues of constitutional and statutory interpretation in the civil rights area. To this end, it is helpful to understand as much as can be discerned about the nominee's views in general on civil rights issues. But even more important is the question of how the nominee will likely approach the kinds of issues that come before the Court. When a nominee has previously served as a judge, past opinions can serve as a guide to the judge's likely approach once he or she is on the Supreme Court. Of course, even past opinions are not an exact predictor of what will happen on the Supreme Court, in part because of the different role that the Supreme Court has in constitutional interpretation as compared to the lower federal courts.

Because General Kagan has not served as a judge, she does not have a paper trail on civil rights issues like those of other recent Supreme Court nominees. During her time in the Clinton White House General Kagan worked on many issues relating to civil rights, but the work of a domestic policy advisor to a President is quite different than that of a Justice of the Supreme Court. As was noted in a June 12, 2010 New York Times article, "[a]s an associate White House counsel from 1995 to 1996, Ms. Kagan provided advice to a president with his own political agenda, so it is hard to gauge how much her analyses reflected her own views or how they would apply if she had the authority of a Supreme Court justice. But since she has never served as a judge and has done only a limited amount of scholarly writing, the 43,000 pages released [on June 4] offer a rare look at her legal thinking that may influence her coming confirmation

hearings." The Lawyers' Committee concurs with this assessment, but hesitates to read too much into the documents she wrote as counsel or advisor to the President absent a clear indication that she personally espoused a particular position which she was urging be adopted. As a domestic policy advisor, Kagan worked within the realm of understanding the President's overall policies, making recommendations as to positions he should take based on the existing political environment, and taking steps to carry out his policies.

Even as Solicitor General, Kagan serves at the direction of President Barack Obama, and thus the positions taken by that office may not entirely reflect her personal views. Nevertheless, the Solicitor General has considerable discretion in determining the federal government's position on civil rights issues and the enforcement of other laws. The Solicitor General decides whether to appeal adverse decisions of lower courts, file *amicus curiae* briefs in appellate courts, or seek review of decisions or participate as *amicus curiae* in the Supreme Court, and in all of those instances determines what position the government will take.[2] The Lawyers' Committee thus considers the positions taken by the Solicitor General's office during General Kagan's tenure as at least suggestive, if not demonstrative, of the views she would likely espouse as a Supreme Court Justice. The Lawyers' Committee therefore reviewed all appellate and Supreme Court briefs submitted on behalf of the federal government in civil rights cases, whether as a party or as *amicus*, during General Kagan's tenure, and whether signed by General Kagan or by the Civil Rights Division of the Justice Department. *Amicus curiae* briefs often deal with important questions of civil rights law, such as the constitutionality of federal civil rights laws, and can affect the lives of millions of Americans as appellate court precedents bind lower courts in their jurisdiction.

Certainly the legal positions that General Kagan has taken, whether as Solicitor General, Dean of Harvard Law School, or as an author, may have some relevance to evaluating her as a future Justice. The Lawyers' Committee also is of the view that the approach that General Kagan has taken generally to civil rights issues in contexts outside of litigation or other legal analysis may well be indicative of the perspective that she would bring to those issues when faced with the task of constitutional or statutory interpretation. That said, tempting though it may be to read policy papers, emails, or even marginal notes as important indicators of her views—particularly because there are so many of them—the Lawyers' Committee is inclined to view those materials with skepticism as accurate predictors of how the nominee might decide particular legal questions.

Conclusion

Based on its review of the available information, the Lawyers' Committee concludes that Elena Kagan has exceptional legal ability, extensive knowledge of the law, mature judgment, a genuine openness to the arguments of others, a high degree of integrity, a remarkable ability to reach across ideological boundaries, and a commitment to the democratic process. She is highly respected by persons who hold a wide range of political, legal and ideological views; and she has demonstrated an ability to work effectively with them. Thus, we have no hesitance whatsoever

[2] United States Department of Justice, Office of the Solicitor General, About the Office, http://www.justice.gov/osg/about-osg.html (last visited July 9, 2010).

in concluding that she meets the first part of the Lawyers' Committee standard: that she "possesses the exceptional competence necessary to serve on the Court."

The second prong of the Lawyers' Committee standard, that a nominee have demonstrated a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws, is an exacting and very particular standard. The Lawyers' Committee focuses principally on civil rights related to racial discrimination and racial justice. General Kagan has on numerous occasions shown considerable sensitivity to civil rights concerns—most notably with respect to discrimination based on gender and sexual orientation—in her academic writings, in her tenure as Dean, and in some of the briefs she has approved as Solicitor General. General Kagan, however, has at times indicated some hesitation about supporting important civil rights remedies and, in some significant areas related to racial discrimination, has not yet had the opportunity to develop a record sufficient to permit an assessment of whether she meets our exacting standards on civil rights.

One of the most critical issues that will continue to confront the Supreme Court in civil rights jurisprudence is that of appropriate deployment of affirmative action, diversity, and race conscious remedies in both a voluntary context and a remedial context to address racial disparities and systemic discrimination. While a Clinton White House policy adviser, General Kagan indicated she would support narrowly-tailored affirmative action plans, but she indicated a preference for race-neutral policies as the strategy most likely to win acceptance and achieve equality for minorities.

Among the most serious problems confronting African Americans, Latinos, and other minorities are a lack of educational opportunity, employment discrimination, home foreclosures, discrimination in criminal justice, and mass incarceration. We believe that General Kagan's record, while generally promising, is not sufficient to allow us to conclude with confidence how she would approach important civil rights issues in these areas. The Lawyers' Committee has long worked, for example, to reduce the crack/powder cocaine disparity and to oppose the racial disparities in the death penalty. While in the Clinton White House General Kagan worked on reducing the crack/powder cocaine sentencing disparity, but her responses in the Senate Judiciary Committee hearing to inquiries concerning sentencing disparity and the death penalty raise questions, in the view of the Lawyers' Committee, about her sensitivity to the civil rights concerns implicated by those issues.

The Lawyers' Committee sees much to commend in General Kagan's record. Nevertheless, because she has not had the opportunity to develop an extensive civil rights record, by, for example, authoring judicial opinions in the civil rights area or serving in an executive branch position in which civil rights was her primary area of responsibility, the Lawyers' Committee does not believe that we have a sufficient body of evidence to conclude that she meets the demanding standard of having demonstrated "a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws." We nevertheless hope, and see reason in her record to expect, that General Kagan will in fact live up to this standard if she is confirmed.

II. BIOGRAPHY

Elena Kagan was born in New York City on April 28, 1960. She was raised on the Upper West Side of Manhattan by her mother, an elementary school teacher, and her father, an attorney who represented tenant associations.

Education and Academic Career

Kagan has impressive academic and professional credentials. After graduating from Hunter College High School, she attended Princeton University, where she majored in history and was a member, and later editorial chair, of the student newspaper, The Daily Princetonian. Kagan graduated *summa cum laude* in 1981 and was named the Daniel M. Sachs Graduating Scholar; this fellowship enabled her to study for two years at Worcester College, Oxford. She received a masters of philosophy from Oxford in 1983.

Kagan then matriculated at Harvard Law School, where she was a supervising editor of the Harvard Law Review before graduating *magna cum laude* in 1986. While on the Harvard Law Review she published an unsigned student note on class action certification in Title VII cases.[3] She clerked for Judge Abner Mikva of the United States Court of Appeals for the D.C. Circuit, and for Supreme Court Justice Thurgood Marshall in the 1987-1988 term. Following her clerkships, Kagan worked as an associate for two years at Williams & Connolly, a prestigious private law firm. In 1991, Kagan began her academic career as an assistant professor at the University of Chicago Law School; Barack Obama arrived at Chicago as a lecturer in law the same year. Kagan's scholarship at the time focused on the First Amendment and regulation of speech, and she published several scholarly articles.[4] She was a popular teacher and earned tenure in 1995, but shortly thereafter took a leave of absence to serve in the Clinton Administration.

Work in the Clinton Administration

In the Clinton Administration, Kagan worked first as Associate White House Counsel (1995-96) and then as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council (1997-99). In June of 1999, President Clinton nominated Kagan to the United States Court of Appeals for the D.C. Circuit, but the Senate Judiciary Committee never held a hearing on her nomination.[5]

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[3]Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619 (1986).

[4]Elena Kagan, *Libel Story: Sullivan Then and Now*, 18 Law & Soc. Inquiry 197 (1993); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. Chi. L. Rev. 873 (1993); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content Based Underinclusion*, 1992 Sup. Ct. Rev. 29 (1992); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996); Elena Kagan, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restrains*, 29 U.C. Davis L. Rev. 957 (1996).

[5] Interestingly, now-Chief Justice John Roberts was then nominated to that same seat by President George W. Bush and confirmed in that position.

Return to Academia and Role as Dean

Kagan returned to academia in 1999. By taking more than two years leave, she had forfeited her tenure at Chicago, and she joined Harvard Law School as a visiting professor. In 2001, Kagan joined the Harvard faculty on a permanent basis, teaching administrative law, constitutional law, civil procedure, and seminars on separation of powers, and pursuing scholarship in the areas of administrative law and executive authority. During this time she published two significant articles on administrative law. [6]

In 2003, Kagan became the first female Dean of Harvard Law School, a position she held for the next six years. As Dean, Kagan was credited with bringing together an ideologically divided faculty, which, due to the faculty role in the appointment process, in turn made possible an unusually large number of experienced faculty hires. Her consensus-building approach also helped lead to an overhaul of the student curriculum and various other school improvements, including expansion of the clinical program, and a strengthened financial commitment to assisting graduates' pursuit of public interest careers. The positions that Dean Kagan took as Dean on civil rights-related issues are discussed below.

Service as Solicitor General

On January 5, 2009, President-elect Obama announced he would nominate Kagan to be the first female Solicitor General. The Senate confirmed her in March 2009 by a vote of 61 to 31, and Kagan made her first appearance in oral argument on September 9, 2009, in *Citizens United v. Federal Election Commission*. Kagan's nomination to the Supreme Court came little more than a year later, and on May 12, 2010, she announced that she would not be participating in new matters in the Solicitor General's office due to her pending nomination.

Board Memberships

Kagan reports that she has served on the boards of Equal Justice Works, the Skadden Fellowship Foundation, the National Constitution Center's Peter Jennings Project for Journalists and the Constitution, the American Law Deans' Association, and the Chicago Council of Lawyers, and has served as a member of the Boston Bar Association Diversity Task Force.

III. POSITIONS KAGAN HAS TAKEN ON CIVIL RIGHTS ISSUES

A. Affirmative Action

Over the course of her career, Kagan, on numerous occasions, expressed her views on affirmative action. These expressions indicate that she supports the use of affirmative action in at least some circumstances, accompanied by an inclination to look beyond affirmative action to other means of achieving racial equality.

[6] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2000); Elena Kagan & David Barron, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201 (2001).

Approval of Briefs as Solicitor General

The clearest position that Kagan has taken on affirmative action was as Solicitor General, in *Fisher v. University of Texas at Austin*, a case dealing with the use of affirmative action in admissions to the University of Texas.[7] This case had its genesis in the Fifth Circuit decision in *Hopwood v. Texas*, after which the university stopped using race as a factor in admissions.[8] When the Supreme Court issued *Grutter v. Bollinger*,[9] which addressed when institutions of higher education could use race as a factor in the admissions process, the university reconsidered the use of race in admissions.[10] It "conducted a study in November 2003 that concluded there was not a critical mass of underrepresented minority students enrolled at the University."[11] The university then adopted a policy—modeled after the policy upheld in *Grutter*—permitting the use of race as one of many "special circumstance[s]" that could be used in the admissions process.[12] The lawsuit challenged that policy, and the district court ruled in favor of the university.[13]

On appeal, General Kagan authorized an *amicus* brief to the Fifth Circuit in support of the constitutionality of the university's use of race in its admission policy, and urging affirmance of the district court's ruling. The United States argued that the university had a compelling interest in promoting classroom diversity and that the affirmative action policy was narrowly tailored to address that compelling interest.[14]

The position of the United States in this case is particularly important, as it was the government's first brief addressing the use of race in higher-education admissions since *Grutter*. As such, the United States' position advancing *Grutter*'s approval of appropriate affirmative action policies was enthusiastically welcomed by the civil rights community and those who support the narrowly-tailored use of race in higher education admissions to help those institutions achieve much needed classroom diversity.

Affirmative Action and Service as Dean

When Kagan became Dean, she declined a chair named after Isaac Royall, an eighteenth-century benefactor to Harvard whose wealth derived from the slave trade, choosing instead to

[7] Fisher v. University of Texas at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009).
[8] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
[9] Grutter v. Bollinger, 539 US 306, 343 (2003) (holding that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").
[10] Fisher v. University of Texas at Austin, 645 F. Supp. 2d at 594-595.
[11] *Id*. at 593.
[12] *Id*. At 594.
[13] *Id*. at 612-613.
[14] Brief for the United States as Amicus Curiae Supporting Appellees, Fisher v. University of Texas at Austin, No. 09-50822 (5th Cir. March 12, 2010).

become the first occupant of a chair named after Charles Hamilton Houston, an African-American lawyer who was one of the architects of the modern civil rights movement. [15]

As Dean, Kagan expressed a commitment to diversity in law school admissions. In one statement, for example, Kagan explained that there has been "a dramatic rise in the number of women and people of color graduating from law school. But we still have a long way to go, and [Harvard] is committed to playing an active role in this area."[16] Kagan's record as Dean reveals both concrete and symbolic steps in support of diversity and equal opportunity. While Kagan was Dean, an average of 30 percent of the entering classes at Harvard Law School consisted of racial and ethnic minorities, up from about 25 percent in the previous six years.[17] The percentage of African-Americans in the entering class increased approximately 25%—from 9.3% to 11.6%—during her six-year deanship compared to the numbers for the preceding six years, and the percentage of Hispanics in the entering class increased during the same period from 4.6% to 6.4%.[18]

Although Kagan was not yet Dean at Harvard when the American Law Deans Association ("ALDA") filed an *amicus* brief in the *Grutter* case, she later served as a member of ALDA's Board of Directors. During that time, Kagan signed a statement to the American Bar Association Accreditation Task Force explaining that the Board believed "that diversity in legal education is a core value, as expressed in the *amicus* brief filed by the ALDA Board in the *Grutter* case."[19] That *amicus* brief had argued that constructing a diverse student body is a "compelling interest and an essential part of the schools' academic freedom" and thus the law school should be permitted to use race as a factor in its admissions process.[20]

During her tenure as Dean, Kagan made aggressive recruitment of top law professors a priority, and she was able to hire an unusually large number of faculty members. She has been widely praised for her success in recruiting ideologically diverse professors in the face of a previously fractured faculty, whose approval was required for all faculty appointments. At the same time, the Law School and, inferentially, Kagan have been criticized because the tenured faculty hired during her deanship lacked significant racial and gender diversity: of the thirty-two tenured and tenure-track faculty members hired, seven were women, and one was a person of color. In contrast, Harvard's primary rival, Yale Law School, hired only ten faculty members during that approximate time period, but five were women and one a person of color.[21] The

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[15] Charles Ogletree, *Why Kagan is a Good Choice for the Supreme Court*, theRoot, (May 12, 2010), http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court?page=0,0&wp_login_redirect=0.

[16] Elena Kagan, *Connecting to Practice*, Harv. Law Bulletin (Fall 2006), at 8, *available at* http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part20.pdf.

[17] Katherine Q. Seelye, *Nominee Scrutinized for Hiring on Race*, N.Y. TIMES, May 14, 2010, at A10, *available at* http://www.nytimes.com/2010/05/14/us/politics/14diversity.html.

[18] Information made available by Harvard Law School.

[19] Statement (Supplement) to ABA Accreditation Task Force (Feb. 9, 2007), *available at* http://www.americanlawdeans.org/images/Statement__Supplemental__to_AB.pdf.

[20] Brief of American Law Deans Association as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 US 306, 343 (2003).

[21] Notably, during this period Harvard hired both an African-American and a woman full professor from Yale.

foregoing hiring statistics, however, do not include visiting professors, entry-level hires, promotions from assistant to full professor, and offers that were turned down or remain open, and they do not take into account the gender or race of professors who may have left the law school.

Several African-American professors at Harvard who have been involved in the hiring process have defended Kagan's commitment to faculty diversity. In particular, Professor Randall Kennedy has noted that Kagan took at least two concrete steps intended to bolster the presence of racial minorities in legal academia. First, she helped form an *ad hoc* committee tasked with identifying promising racial minority candidates for the Harvard Law faculty. Second, she was an active supporter of the Charles Hamilton Houston and Reginald Lewis Fellowship Programs at Harvard, which have served as launching pads for racial minorities into careers in legal academia. Kennedy also noted, in a statement supporting the nomination, "it is mistaken to suggest…that the Dean of Harvard Law School is responsible for all that happens or does not happen with respect to hiring. Support of the Dean may be necessary to an appointment, but it is not sufficient to ensure one."[22] The White House has also suggested that Harvard's record of faculty job offers during Kagan's deanship reflected greater racial diversity, but the administration has declined to release supporting numbers, citing privacy concerns.

Finally, one incident at Harvard indicated that Kagan had at least some discomfort with using affirmative action as a remedy for gender disparities. Kagan served as one of three faculty advisors to the Harvard Law Review, a student-run journal often viewed as a ticket to highly sought judicial clerkships and careers in academia. Women were often underrepresented on the Law Review, which selected its membership through a competitive process based on grades and/or scores on a writing competition.[23] In 2003, the Law Review membership debated adding gender to the organization's existing list of characteristics, which included race and disability, that could be considered in the allocation of a limited number of discretionary spots on the journal.[24] Kagan counseled against doing so, expressing concern that it would throw women's qualifications into question.[25] In a Harvard Crimson article, Kagan was quoted as stating:

> The underrepresentation of women on the Law Review is a concern, but I'm not inclined to think that affirmative action is the answer. I think that in this context the costs of affirmative action would outweigh the benefits of putting another handful of women on the Review. I think we should focus instead on discovering the reasons for gender disparities within law schools generally; that would be a very significant contribution to legal education.[26]

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[22] Randall L. Kennedy, *The Media Jabs are Unfair, Kagan Will Fight for Equality on the Court*, THE HUFFINGTON POST, May 12, 2010, http://www.huffingtonpost.com/randall-l-kennedy/post_603_b_573085.html.
[23] Lauren A.E. Schuker, "Law Review Draws Fire for Gender Gap." The Harvard Crimson: Online Edition (Nov. 11, 2003), *available at* http://www.thecrimson.com/article/2003/11/10/law-review-draws-fire-for-gender/.
[24] *Id.*
[25] *Id.*
[26] *Id.* In fact, a committee of students at Harvard Law was then engaged in a study of women's experiences and barriers to success at the law school and issued a report in 2004. Working Group on Student Experiences, Study on

Affirmative Action and Work in the White House

Keeping in mind the political nature of her White House positions, with the resulting impetus to carry out the President's policies, there are indications in the White House documents reviewed by the Lawyers' Committee that Kagan understood the role of affirmative action in remedying past discrimination but advocated that the Administration focus on tools other than affirmative action in developing a race initiative for the Administration.

In her work on the Domestic Policy Council, Kagan frequently dealt with issues relating to race and civil rights, although not necessarily affirmative action. In one memorandum to the President, Kagan (and her co-author and boss Bruce Reed) seemed guarded in terms of using affirmative action policies. Reed and Kagan explained:

> [T]here is still a need for strong civil rights enforcement, narrowly tailored affirmative action programs, and certain other kinds of targeted initiatives…the best hope for improving race relations and reducing racial disparities over the long term is a set of policies that expand opportunity across race lines and, in doing so, force the recognition of shared interests. These policies—for example, education opportunity zones, university-school mentoring programs, housing vouchers, and community policing and prosecuting initiatives—address the concerns of working people of all races, at the same time as they provide especial benefits to racial minorities.[27]

A memorandum to the President dated November 6, 1997, also from Kagan and Reed, appears to be an earlier version of the foregoing November 11 memorandum.[28] The two memoranda are similar, with the predominant theme of each being that the Administration's race initiative should be an "opportunity agenda," focusing on education and economic empowerment, with policies that are "race neutral." The earlier November 6 memorandum qualifies the reference to "race-neutral" policies with the phrase "[f]or the most part…."

Consistent with the theme of developing policies that rely on tools other than affirmative action, Reed and Kagan also wrote a memorandum to Erskine Bowles, Sylvia Mathews and John Podesta captioned "Long-Term Strategic Planning," stating: "We should take the President's commitment to race reconciliation seriously—but largely by focusing not on race itself, but on the problems of education, health care, crime, etc., felt by people in poor rural areas and inner cities."[29]

Women's Experiences at Harvard Law School, (February 2004), *available at* http://www.law.harvard.edu/students/experiences/FullReport.pdf.

[27]Memorandum from Bruce Reed and Elena Kagan to President Clinton (Nov. 11, 1997), *available at* http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Subject%20File%20Series/Box%20124%20Race%20Initiative%20Doc%209.pdf.

[28]Memorandum from Bruce Reed and Elena Kagan to President Clinton (Nov. 6, 1997), *available at* www.clintonlibrary.gov.

[29] *See* Memorandum from Bruce Reed and Elena Kagan to Erskine Bowles, Sylvia Mathews and John Podesta,

B. Civil Rights Enforcement

Turning to civil rights issues other than affirmative action, we focus primarily on General Kagan's actions and positions as Solicitor General which generally, though not in each instance, were consistent with positions taken by the Lawyers' Committee.

Kagan's Involvement with Civil Rights Enforcement Cases as Solicitor General

Two of the most recent and important civil rights cases in which the United States participated—*Ricci v. DeStefano*[30] and *Northwest Austin Municipal Utility District Number One v. Holder*[31]—were briefed before Kagan was confirmed as Solicitor General and were argued by Deputy Solicitor General Neal Katyal. When General Kagan had been in office for less than two weeks (and thus at a time when it is not clear if she had significant input into the case), she signed a brief adverse to the interests of the Lawyers' Committee in *Cuomo v. Clearinghouse*,[32] seeking to preclude states from enforcing fair housing laws against lending institutions. General Kagan submitted merits briefs on civil rights laws only twice to the Supreme Court during her tenure, one of which was favorable to potential civil rights plaintiffs, and another which was not. Those cases, as well as others civil rights cases in which General Kagan played a role, are discussed below.

Lewis v. Chicago

The most important civil rights enforcement case with which General Kagan has been involved in during her tenure as Solicitor General is *Lewis v. Chicago*. In *Lewis*, Kagan supported an interpretation of Title VII that would help victims of discrimination seek legal redress for their claims.[33] In that case, the district court found that the test used by the City of Chicago for hiring firefighters violated Title VII because it lacked a relationship to firefighter performance and had a disparate adverse impact on African-American applicants.[34] The court of appeals reversed the district court on timeliness grounds, holding that charges needed to have been filed within 300 days of the announcement of the practice.[35] Thus the issue in *Lewis* was whether each hiring decision by the City of Chicago based on an employment examination that has a disparate impact on non-white participants constitutes a separate violation of Title VII for purposes of tolling its statute of limitations.[36] The view taken by the Seventh Circuit, that such

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available at http://elenasinbox.com/thread/attached-memo-3/.

[30] Ricci v. DeStefano, 129 S. Ct. 2658 (2009). The Lawyers' Committee in conjunction with other civil rights organizations submitted an *amicus* brief in support of DeStefano. *See* Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law; National Urban League; National Association for the Advancement of Colored People; and the Equal Justice Society in Support of Respondents. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

[31] Northwest Austin Municipal Utility District Number One v. Holder 129 S. Ct. 2504 (2009). The Lawyers' Committee for Civil Rights Under Law served as Counsel for Defendant Intervenors in this case.

[32] Cuomo v. Clearing House Ass'n, L.L.C., 129 S.Ct. 2710 (2009).

[33] *See* Brief of the United States as Amicus Curiae Supporting Petitioners, Lewis v. Chicago, 130 S.Ct. 2191, slip op. (U.S. May 24, 2010).

[34] Lewis v. Chicago, 130 S.Ct. 2191, slip op. at 3 (U.S. May 24, 2010).

[35] *See Id.*

[36] *See Id.* at 3-4.

actions did not toll the statute of limitations, would have significantly limited the ability of victims of discrimination to have their claims addressed.

Under the direction of General Kagan, the United States vigorously argued that the Supreme Court should reverse the decision of the Seventh Circuit. The United States filed a petition at the *certiorari* stage in support of the plaintiffs' petition, urging the Court to review the case.[37] When the Supreme Court granted *certiorari*, the United States submitted an *amicus* brief asking the court to reverse the Seventh Circuit.[38] That brief took the same position as the *amicus* brief submitted by a collection of civil rights organizations, including the Lawyers' Committee.[39] The Solicitor General argued for a reading of Title VII's statute of limitations favorable to the enforcement of Title VII and its objectives, countering the argument made by the City of Chicago that plaintiffs are only permitted to file a claim within a certain number of days after the release of the examination's results, rather than after each use of the examination in a hiring decision.[40] The Supreme Court subsequently reversed the Seventh Circuit in a unanimous opinion adopting the position urged by both the Lawyers' Committee and the United States.[41]

Perdue v. Kenny A.

The only other Supreme Court brief on civil rights enforcement submitted at the merits stage by the Solicitor General's office under General Kagan's leadership was in *Perdue v. Kenny A.* In *Perdue*, she argued that the fees awardable to civil rights attorneys should be limited to the "lodestar" calculations—hours worked multiplied by billing rates—regardless of the quality of their representation or the success achieved for clients.[42] In this case, lawyers from a non-profit advocacy organization and private counsel acting *pro bono* represented children in Georgia's foster care system in a suit against the state.[43] The plaintiffs alleged that Georgia's system of foster care violated various provisions of state and federal law, including 42 U.S.C. § 1983 (a statute giving federal courts jurisdiction to hear suits against state actors for violations of civil rights).[44] The lawsuit subsequently settled, and the settlement agreement provided for reasonable attorneys' fees for the plaintiffs' attorneys.[45] In awarding attorneys' fees, the district court determined that the normal award to be given to the plaintiff's counsel under the lodestar method did not adequately compensate the attorneys for their superior representation and the excellent

[37] *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari, Lewis v. Chicago, 130 S.Ct. 2191, slip op. (U.S. May 24, 2010). At the *certiorari* stage, the petitioners were represented in part by the Chicago Lawyers' Committee for Civil Rights Under Law, an organization affiliated with the Lawyers' Committee on Civil Rights Under Law.
[38] *Id.*
[39] *Compare Id. with* Brief for the National Partnership for Women and Families and the National Women's Law Center, et al., in Support of Petitioner, Lewis v. Chicago, 130 S.Ct. 2191, slip op. (U.S. May 24, 2010).
[40] Brief of the United States as Amicus Curiae Supporting Petitioners, Lewis v. Chicago, 130 S.Ct. 2191, slip op. (U.S. May 24, 2010).
[41] Lewis v. Chicago, 130 S.Ct. 2191., slip op. at 11 (U.S. May 24, 2010)
[42] Brief of the United States as Amicus Curiae Supporting Petitioners, Perdue v. Kenny A., No. 08-970, slip op. (U.S. April 21, 2010).
[43] Kenny A. Ex Rel. Winn v. Perdue, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2006).
[44] *Id*. at 1266-1267.
[45] *Id*. at 1269-1270.

results they achieved for their clients.[46] As such, the district court awarded a fee enhancement to the plaintiffs' attorneys.

The Lawyers' Committee in its own *amicus* brief argued that the enhancements at issue were authorized by federal fee-shifting statutes and that they were appropriate in the case at issue.[47] In addition, the Lawyers' Committee argued that enhancements above normal lodestar calculations fit with Congressional intent for fee-shifting provisions to help provide incentives for attorneys to represent clients in civil rights cases.[48]

The United States filed a brief which not only argued that the plaintiffs were not entitled to an enhancement but that the court should adopt a rule conclusively presuming that "enhancements made based on the quality of representation or results obtained are not permissible."[49] The United States mentioned only one exception to a "no enhancement" rule—where an attorney suffers "ancillary harm" by representing an unpopular or highly controversial client.[50]

The Supreme Court ruled, in a 5-4 opinion, that the plaintiffs were not entitled to an enhancement of fees. Though the Court created a standard which made it difficult to obtain enhancement, it did not adopt the "conclusive presumption" standard urged by the United States.[51] Justice Breyer, joined by Justices Ginsburg, Sotomayor and Stevens, would have deferred to the district court's judgment, given the fact-intensive nature of the inquiry.[52]

The position that the United States took in this case is troubling to the Lawyers' Committee, as it advocated eliminating fee enhancements that help encourage competent and capable attorneys to represent the interests of potential plaintiffs whose civil rights have been violated. Indeed, the United States took an even less pro-civil rights enforcement position than the opinion that emerged from the conservative majority. If these are General Kagan's personal views, it would be disconcerting. It certainly may be the case that the position taken in the Solicitor General's brief did not reflect General Kagan's own views, but rather is attributable to zealous advocacy on behalf of the United States, which would itself be responsible for heightened attorneys' fees under the fee-shifting statute.

Staub v. Proctor Hospital

On April 19, 2010, the Supreme Court granted the Petition for Writ of Certiorari in *Staub v. Proctor Hospital,* No. 09-400. The case presents the following question: "In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?" The Seventh Circuit

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[46] *Id.* at 1288-1290.
[47] Brief for the Lawyers' Committee for Civil Rights Under Law, et al., in support of Respondent, Perdue v. Kenny A., No. 08-970, slip op. (U.S. April 21, 2010).
[48] *Id*.
[49] Brief for the United States, *et al*., in support of Respondent, Perdue v. Kenny A., No. 08-970, slip op. (U.S. April 21, 2010), at 18.
[50] *Id.* at 18 n.5.
[51] Perdue v. Kenny A., *No.* 08–970, slip op. at 9-15 (U.S. April 21, 2010).
[52] Perdue v. Kenny A., *No.* 08–970, Breyer, J. (dissenting), slip op. at 2 (U.S. April 21, 2010).

set aside a jury verdict and ordered dismissal of the action, applying a stringent "singular influence" standard.[53] Under that standard, the court concluded that the unlawful intent of an official could only be considered if the official exercised singular influence over the ultimate decisionmaker.[54]

The Solicitor General was invited to file a brief at the petition stage in *Staub*. Solicitor General Kagan is listed as counsel of record on the brief for the United States, which urged the Court to grant the petition. The United States argued that the Seventh Circuit erred in requiring Staub to show that the employee with discriminatory animus had "singular influence" over the adverse employment action. The brief argues: "Where, as here, the discriminatory animus of a supervisory employee who is not the ultimate decisionmaker sets in motion and plays a substantial role in driving an adverse employment decision, that animus is a 'motivating factor' even if the ultimate decisionmaker does not act in 'blind reliance' on the supervisor's recommendation." The brief also asserts that an independent investigation can break the causal chain between a supervisor's misconduct and an adverse employment action. *Amicus* briefs on the merits in support of the Petitioner are due to be filed by July 9.

Staub presents the same "cat's paw" issue that was presented in *BCI Coca-Cola Bottling Company of Los Angeles v. EEOC*, which settled before the Supreme Court had opportunity to decide the case.[55] The Lawyers' Committee filed an amicus brief in *BCI* arguing that the employer should be liable based on the unlawful intent of officials who caused or influenced the employment decision, even if that official did not make the ultimate employment decision. The Solicitor General's position at the petition stage in *Staub* is thus similar to the position taken by the Lawyers' Committee in *BCI*.

Browning v. United States

In *Browning v. United States*, the plaintiff, a fourteen-year employee of the Internal Revenue Service, alleged that she was demoted as a result of racial discrimination and in retaliation against a previous complaint of discrimination. At the close of her trial, relying upon the Supreme' Court's decision in *Reeves v. Sanderson Plumbing Products*[56], Browning requested a permissive pretext instruction, stating that the jury "may infer discriminatory or retaliatory motive" if the government's explanation of why it demoted her "is not worthy of belief."[57] In *Reeves*, the Supreme Court held, in pertinent part, that

> [i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the

[53] Staub v. Proctor Hospital, 560 F.3d 647, 659 (7th Cir. 2009).
[54] *Id.*
[55] *See* BCI Coca-Cola Bottling Company of Los Angeles v. EEOC, 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007).
[56] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).
[57] Reply Brief for Petitioner, Browning v. United States (No. 09-583), 1.

> factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." [58]

The district court denied the requested jury instruction, and the Ninth Circuit affirmed, holding that because the jury instructions "set forth the essential elements the plaintiff needs to prove, the district court's refusal to give an instruction explicitly addressing pre-text is not reversible error."[59] The Ninth Circuit also relied upon the district court's offer to "permit counsel full latitude to argue inferences" and that Browning was allowed to argue pretext based upon disbelief of the government witnesses in making its decision.[60] The court noted the circuit split on the question of permissive pretext instructions in its opinion.[61] Browning petitioned for *certiorari* but was unsuccessful in convincing the Supreme Court to take the case.

In the United States' brief in opposition to the petition for *certiorari*, for which General Kagan is counsel of record, the government acknowledged the split among the federal courts of appeals on whether it is error for a district court to decline to issue a permissive pretext jury instruction when requested by the plaintiff.[62] But the United States asserted that no circuit split existed on whether such a permissive pretext jury instruction must include language that jurors are *not required* to draw such an inference.[63] The United States also asserted that Browning did not show "a sufficient evidentiary predicate to justify the district court's including an inference instruction." The brief also argued that even if the district court's failure to allow the permissive pretext jury instruction was in error, Browning could not show that it "affected her substantial rights" and thus "incurred no prejudice." [64]

In reply, Browning noted that the United States' argument that she lacked the evidentiary basis to allow a permissive pretext discussion was new, and had not been presented at either the trial court or the Ninth Circuit.[65] Indeed, the Ninth Circuit opinion says nothing about any supposed lack of evidentiary support for the jury instruction or any argument being made to that effect by the United States.

While it is perhaps not surprising that Solicitor General Kagan would seek to preserve the government's victory in the trial and at the appellate level, the positions taken by the United States' opposition to the *cert* petition are apparently contrary to positions previously taken by the Equal Employment Opportunity Commission (EEOC) in prior cases, as was pointed out in Browning's reply. In its *amicus curiae* brief to the Fifth Circuit in *Ratliff v. City of Gainesville*,[66] for example, the EEOC approved of the permissive pretext jury instruction and stated that it "accurately states an important principle of proof in disparate treatment cases."[67] The Fifth Circuit evidently agreed, as it held that the district court should have allowed a permissive

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[58] *Reeves*, 530 U.S. 133 at 147.
[59] Browning v. United States, 567 F.3d 1038, 1041 (2009).
[60] *Id.* at1042.
[61] *Id.*
[62] Brief for Secretary of Treasury in Opposition, Browning v. United States (No. 09-583), 2010 WL 984118, at *6.
[63] *Id.* at 8 (emphasis added).
[64] *Id.* at10-11.
[65] Reply Brief for Petitioner, Browning v. United States (No. 09-583), 2010 WL 1256460, at *11.
[66] Ratliff v. City of Gainesville, 256 F.3d 355 (5th Cir. 2001).
[67] See Reply Brief for Petitioner, Browning v. United States (No. 09-583), 2010 WL 1256460, at *2-3.

pretext instruction that the jury "may presume" the employer was motivated by an impermissible factor. Browning's reply also quoted the EEOC's *amicus curiae* brief to the Eleventh Circuit in *Conroy v. Abraham Chevrolet-Tampa, Inc.*[68] on the issue of prejudice from the failure to allow a permissive pretext jury instruction ; in that case, the EEOC argued that "the jury disbelieved the defendant's explanation but concluded, incorrectly, that such a disbelief was not enough to sustain" the plaintiff's burden of proof. The EEOC therefore asserted that arguments by counsel "are not an adequate substitute for a complete and accurate statement of the law by the judge."[69]

United States v. New York City Board of Education

In *United States v. New York City Board of Education*[70], General Kagan approved a legal strategy with potentially serious ramifications for future settlements in discrimination lawsuits. In 1996 the Justice Department filed suit against the New York City Board of Education alleging that, due to recruitment discrimination, women, African Americans, Asian Americans and Latinos had been disproportionately excluded from permanent positions as school custodians. As part of a 1999 settlement negotiated by the Clinton Administration Justice Department, minorities and women previously hired on a temporary basis were given permanent status and provided job benefits, including retroactive seniority, which they would have received were it not for the Board's discriminatory practices. A group of white custodians appealed to the Second Circuit, contending that they should have been allowed to intervene in the case. On that appeal, the United States argued that the seniority awards were "lawful under the Equal Protection Clause" and were "proper make-whole relief for victims of discrimination."[71] The Second Circuit agreed that the settlement agreement merely restored the plaintiffs "to positions they would have held but for discrimination," but concluded that the magistrate judge erred in denying the white custodian's motion to intervene.[72]

During post-remand discovery, the United States determined that certain plaintiffs received competitive seniority dates under the settlement agreement that were about two years earlier than the seniority dates they would have received absent the discrimination. The United States requested that those individuals not receive the retroactive competitive seniority dates under the agreement.[73] The district court refused the government's request to adjust the seniority dates of those individuals, however, because, for purposes of transfers and temporary assignments under an affirmative action theory, the seniority awards could be upheld even if they exceeded make-whole relief.[74] The white custodians again appealed, and the United States cross-appealed on the award of retroactive competitive seniority to the extent it exceeded make-whole relief.

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[68] Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228 (2004).
[69] Reply Brief for Petitioner, Browning v. United States (No. 09-583), 2010 WL 1256460, at *6-7.
[70] United States v. N.Y. City Bd. of Educ. (No. 08-5171).
[71] Brief for the United States as Appellee-Cross-Appellant, United States v. N.Y. City Bd. of Educ. (No. 08-5171), at 13.
[72] Brennan v. New York City Bd. of Educ., 260 F.3d 123, 129-133 (2d Cir. 2001).
[73] Brief for the United States as Appellee-Cross-Appellant, United States v. N.Y. City Bd. of Educ. (No. 08-5171), at 14.
[74] *Id.* at 16.

In its cross-appeal, the government argued that the district court's use of an affirmative action theory to maintain the competitive seniority dates of certain plaintiffs "was error." It further argued that allowing those individuals retroactive competitive seniority violates the Equal Protection Clause and Title VII.[75] The United States asserted that the court should implement "a race-neutral mechanism" by identifying the "actual victims of its discriminatory exams and then [it could] easily calculate the retroactive relief that would make them whole for the injury they have suffered."[76] Further, the United States argued that the failure of the court to use the race-neutral mechanism would adversely impact "innocent third parties."[77] While the government said that it was taking these positions only under the facts of this particular case, making the arguments that it did about the use of race-conscious remedies will make it difficult to take a contrary position in any subsequent case.

As the United States acknowledged in its reply brief to the Second Circuit, the formulation of remedies in the settlement of class actions is an inexact exercise. Indeed, the government cited to the Supreme Court's statement in *International Bhd. of Teamsters* v. *United States*[78] that "[g]iven the inherent difficulty of "recreating the past," the determination of proper make-whole relief "will necessarily involve a degree of approximation and imprecision."[79] Yet although the award of competitive seniority was a factor previously negotiated in the settlement to eliminate racial imbalance and was approved by the district court even after the trial judge became aware that certain individuals received incorrect competitive seniority dates the government elected to ask the Second Circuit to abandon the race-conscious remedy in favor of the race-neutral approach it outlined. Oral argument was held earlier this year; a decision is pending.

Cases Involving State Officials and State Agencies

General Kagan also approved the United States' vigorous defense of federal civil rights laws against challenges by state officials. In two cases—*Hale v. King*[80] and *Brockman v. Texas Department of Criminal Justice*[81]—General Kagan approved appellate briefs on behalf of the United States as an intervenor defending the Americans with Disabilities Act ("ADA") provision abrogating states' Eleventh Amendment immunity for claims brought pursuant to Title II. In those briefs, the United States argued that Title II of the ADA was valid legislation pursuant to Congress' power under Section 5 of the Fourteenth Amendment as determined by the *Boerne* framework.[82] Because Congress also uses its power under Section 5 of the Fourteenth Amendment to address the deprivation of civil rights by state actors on account of a variety of

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[75] *Id.* at 64-71.
[76] *Id. at* p. 68.
[77] *Id. at* 68- 69.
[78] *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977).
[79] Reply Brief for the United States as Appellee-Cross-Appellant, *U.S. v. NY City Bd. Of Educ.* (No.08-5171), at 9, *citing International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977).
[80] Brief for the United States as Intervenor, Hale v. King, No. 07-60997 (5th Cir. April 9, 2010).
[81] Brief for the United States as Intervenor, Brockman v. Texas Department of Criminal Justice, No. 09-40940 (5th Cir. March 29, 2010).
[82] Brief for the United States as Intervenor, Brockman v. Texas Department of Criminal Justice 7-10, No. 09-40940 (5th Cir. March 29, 2010); Brief for the United States as Intervenor 3-4, Hale v. King, No. 07-60997 (5th Cir. April 9, 2010).

characteristics, including gender and age, this support for Congress' power to address civil rights concerns is particularly encouraging.

General Kagan also authorized the filing of several *amicus* briefs in courts of appeals defending the applicability of federal civil rights statutes to certain state activities. In *Armstrong v. Schwarzenegger*, the United States argued that Title II of the ADA gave the Attorney General the ability to promulgate implementing regulations, and that those regulations applied to state contracts with county jails.[83] In *Oster v. Wagner*, the United States argued that individuals with disabilities who currently receive community-placement services under a State's Medicaid program may bring an integration claim under Title II of the ADA if the State is going to cut or reduce those services, thereby placing such individuals at serious risk of being institutionalized.[84] In *Long v. Benson*, the United States argued that implementing regulations of Title II of the ADA may be enforced through the private right of action authorized by the statute.[85] The United States also argued that if public entities operate a program that includes the provision of individual services, then such entities are required to provide personal devices and services to individuals with disabilities in the most integrated appropriate setting.[86] The position of the United States in these cases represents a robust interpretation of federal civil rights law.

Remedies in Civil Rights Cases

Under General Kagan's authorization, the United States also filed several *amicus* briefs that supported the ability of victims of civil rights violations to seek appropriate relief. In *Baker v. Windsor Republic Doors*, the United States argued that damages are available in actions under Section 503 of the Americans with Disabilities Act for retaliation in employment.[87] The brief for the United States urged the Sixth Circuit to reject an approach to the ADA taken by the Seventh and Ninth Circuits that found damages unavailable for retaliation claims.[88] In *Ojo v. Farmers Group*, the United States argued that the Fair Housing Act prohibits discrimination in the provision of homeowners insurance.[89] The United States also argued that any limitations on Congressional authority to regulate the insurance industry did not deprive federal courts of subject matter jurisdiction to hear a claim asserting discrimination in homeowners insurance that may conflict with state law.[90] Finally, in *Harris v. Mayor and City Council of Baltimore*, the United States submitted an *amicus* brief asking the appellate court to reverse a district court ruling against a victim of workplace sexual harassment on summary judgment to ensure that the

[83] Brief for the United States as Amicus Curiae Supporting Appellees and Urging Affirmance, *Armstrong v. Schwarzenegger*, No. 09-17144 (9th Cir. January 13, 2010).
[84] Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees and Urging Affirmance on the Issue Addressed Herein, *Oster v. Wagner*, No. 09-17581 (9th Cir. March 2, 2010).
[85] Brief for the United States as Amicus Curiae in Support of Appellee, *Long v. Benson*, No. 08-16261-AA (11th Cir. Apr. 2, 2009).
[86] *Id*.
[87] Brief of the Equal Employment Opportunity Commission and the United States as Amicus Curiae in Support of Plaintiff/Appellee-Cross-Appellant, *Baker v. Windsor Republic Doors*, Nos. 08-6200 & 09-5722 (6th Cir. Dec. 21, 2009).
[88] *Id*.
[89] Letter Brief Submitted by the United States as Amicus Curiae in Response to the Court's Orders, *Ojo v. Farmers Group*, No. 06-55522 (9th Cir. Jan. 29, 2010).
[90] *Id*.

claims could be fully heard.[91] In all of these cases, the United States sought to ensure that victims of civil rights violations had the ability to recover any appropriate damage they were owed in our federal courts.

Under General Kagan's leadership, the United States has adopted some strong positions supporting interpretations and applications of federal civil rights law that helped protect individuals from civil rights violations and strengthened the availability of appropriate relief. On the other hand, a number of positions adopted under her leadership cause concern to the Lawyers' Committee. Due to General Kagan's short tenure as Solicitor General, the Lawyers' Committee does not believe that it has sufficient information to fully assess General Kagan's views on these issues.

Other Indicators of Enforcement Philosophy

Although neither of Kagan's administrative law articles addresses issues of civil rights directly, the articles do suggest that Kagan might endorse greater judicial deference to both executive and administrative actions, which could have ramifications for the enforcement of civil rights laws. In her most well-known article, *Presidential Administration*, Kagan analyzed and defended the ways in which President Clinton controlled administrative agencies by refining and expanding a variety of tools of presidential power that originally had been created by the Reagan White House.[92] The view she advocated at the time was one that endorsed the exercise of far more executive power than had been previously accepted. *Presidential Administration* was named the top scholarly administrative law article of 2002 by the American Bar Association and has been cited more than 300 times in other journals, decisions and legal briefs.

A second, co-authored article, *Chevron's Nondelegation Doctrine*, proposes a new legal standard for applying deference to agency decisions in light of the Supreme Court's engagement of the *Chevron* doctrine in *United States v. Mead Corp.*, 533 U.S. 218 (2001).[93] The article argues that courts should give enhanced deference to decisions made by those high level administrative officials to whom Congress directly delegated authority, and withheld from decisions that have been instead delegated to lower level officials.[94]

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[91] Brief for the United States as Amicus Curiae Supporting Appellant and Urging Reversal, *Harris v. Mayor and City Council of Baltimore*, No. 09-1446 (4th Cir. June 10, 2009).

[92] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2253 (2001) (describing "a mostly sympathetic view of both the legality and the wisdom of this emergent system of presidential control").

[93] Elena Kagan & David Barron, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201 (2001). A number of courts known for their sophistication have cited to this article. *See, e.g., De La Mota v. U.S. Dept. of Educ.*, 412 F.3d 71, 79 (2nd Cir. 2005); *Keys v. Barnhart*, 347 F. 3d 990, 994 (7th Cir. 2003); *Christiana Town* Center, *LLC v. New Castle County*, 2009 WL 781470, *8 n.39 (Del. Ch. Mar. 12, 2009).

[94] *Supra* note 16 at 204, 235. A noteworthy dimension of this article is its dispassionate analysis of both the majority and the dissenting opinions in *Mead*, identifying the strengths and weaknesses of each while offering an alternative to both.

C. The First Amendment and Civil Rights: The Case of Hate Speech

One of Kagan's most important law review articles, *Regulation of Hate Speech and Pornography After R.A.V.*, [95] focuses on the First Amendment and government regulation of hate speech and pornography. A recurring challenge in civil rights enforcement is that civil rights principles may sometimes be in tension with First Amendment principles. For example, bans on race or gender discrimination by organizations may come into conflict with freedom of association values, and bans on racially-offensive speech directed at minorities can conflict with the freedom of speech. Thus her proposed solutions to the difficult problem of balancing these civil rights and First Amendment values may provide insights into her approach to civil rights issues as a Supreme Court Justice.

In the article, Kagan proposes several approaches to regulating hate speech and pornography. The background of her article is decisions by the Supreme Court in R.*A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992), and *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem*, 475 U.S. 1001 (1986). In *R.A.V.*, the Supreme Court struck down a hate speech ordinance on the grounds that it reflected viewpoint discrimination that violated the First Amendment, and in *Hudnut*, the Court invalidated an anti-pornography ordinance on the same grounds. Kagan does not argue that either decision was wrong or should be overruled, nor does she say that she agrees with either decision. Instead, the point of her article is to explore ways that pornography and hate speech can still be regulated consistently with these decisions.

Kagan begins by taking as fact that "we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation." Nevertheless, she also considers the "presumption against viewpoint discrimination as the very keystone of First Amendment jurisprudence."[96] Kagan makes the case that regulation of pornography and hate speech may be possible through four possible approaches: (1) the enactment of new or stricter bans on conduct; (2) the enactment of certain kinds of viewpoint-neutral bans on conduct; (3) the enhanced use of the constitutionally unprotected category of obscenity; and (4) the creation of carefully supported and limited exceptions to the general rule against viewpoint discrimination."[97]

In regard to bans on conduct, she says that "conduct" means actions that are not primarily expressive. While a ban on certain types of hate speech may offend the First Amendment, bans on hate crimes should present no First Amendment problem since they apply regardless of whether the crime is meant to convey any message. Thus, she argues, hate crimes statutes are like other discrimination laws, such as bans on race-based employment discrimination. She concludes that "communities should be able not only to impose enhanced criminal sanctions on the perpetrators of hate crimes, but also to provide special tort-based or other civil remedies for their victims."

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[95] Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. Chi. L. Rev. 873, 873 (1993).
[96] *Id.* at 901.
[97] *Id.* at 883.

A second approach, she argues, is to enact viewpoint-neutral restrictions on certain "low value" categories of speech that do not receive First Amendment protection. For example, fighting words that are likely to lead to violence are not protected by the First Amendment because they can lead to violence. Child pornography is not protected, at least in part because it inherently involves exploitation of children. She recognizes that these categories of unprotected speech cannot be defined too broadly without undermining the principle that the government cannot engage in viewpoint discrimination. For example, a bar on any speech whose creation involves a violation of law would sweep in much speech that has been constitutionally protected.

A third approach, she argues, is to regulate pornography on the basis that it includes only obscenity, which the Court has said is not protected by the First Amendment. For example, she suggests that "some consideration should be given to whether a statute focusing on the particular kinds of obscenity that most contribute to sexual violence" would be consistent with *R.A.V.*

Finally, a fourth approach is to regulate hate speech or pornography on the basis that it constitutes an exception to the ban on viewpoint discrimination. In *R.A.V.*, the problem, according to the majority, was that the ban included only a subcategory of fighting words, namely, speech based on race, creed, religion and gender. Presumably, a complete ban on fighting words would have not constituted viewpoint discrimination. Using this approach, an entire category of pornography or obscenity would be recognized as low value speech, and a ban on the entire category would not offend the First Amendment. The challenge is to identify the boundaries of such a category in a way that does not suggest hostility to a particular message.

In the conclusion to her article, Kagan concedes that the approaches that she has offered do not represent dramatic changes to the law, but argues they are worth pursuing: "I have suggested in this Essay that the regulatory efforts that will achieve the most, given settled law, will be the efforts that may appear, at first glance, to promise the least…. Such efforts will not eradicate all pornography or hate speech from our society, but they can achieve much worth achieving."

Because this article neither focuses on civil rights nor articulates a broad judicial philosophy, we hesitate to draw too many conclusions from it. Nevertheless, we view this article as reflecting the approach of someone who believes that pornography and hate speech can impose serious costs on women and minorities, but who also believes that ways must be found to lessen these costs that are consistent with established First Amendment principles.

D. Kagan's Student Note on Title VII

Though written while she was a student, Kagan's 1986 Note in the Harvard Law Review merits attention as it provides a glimpse into her thinking on how she might resolve conflicting priorities to effectuate Title VII's remedial purpose.[98]

Kagan examines a judicial split with respect to certification of Title VII classes and presents her proposed resolution of the split. She observes that one approach has been to apply

[98] Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619 (1986).

"a strict unity-of-interest test" in which courts have held that job applicants, current employees, future employees, and former employees, as well as employees who held different jobs or worked in different facilities, could not belong to the same class as their interests may be too different. She observes as a downside to this approach that it inhibits effective enforcement of Title VII and arguably undermines the goals of the statutory scheme by impeding the ability of private plaintiffs to serve their intended role as a primary enforcement mechanism.[99] Kagan further observes that a practical consequence of this approach is to reduce the size of classes, which in turn may make it difficult to attract competent counsel to handle the case. Even more importantly, according to Kagan, a plaintiff suing individually or on behalf of a small class would be less likely than the representative of a large class to obtain fair and adequate relief.[100]

The other approach, described by Kagan as the "across-the-board" approach, involves certification of large classes despite the existence of some of the foregoing differences among individual class members, where the plaintiff presents significant proof that a general policy of discrimination manifested itself in different employment decisions in the same general fashion.[101] Kagan notes that, while such decisions have aided Title VII enforcement, courts in these cases often failed to protect absentee interests adequately. She notes that the protection of such interests is required both by Rule 23 of the Federal Rules of Civil Procedure and by the U.S. Constitution, focusing on the requirement of due process that judicial procedure fairly protect the interest of absent parties who are bound by class determinations.[102] She notes that the named plaintiff in an "across-the-board" Title VII action may fail to meet this representational standard, because the named plaintiffs' interests may differ too greatly from those of the other members of the class.

Kagan's solution is for courts to make extensive use of their authority under Rule 23 to devise sub-classification schemes. She believes that use of such schemes will enable courts to promote substantive policies of Title VII while adequately protecting the interests of absent class members.[103] In proposing this approach, Kagan appears to understand the need for vigorous private enforcement of Title VII, but seeks to temper that goal with recognition of other procedural and policy issues. She does not address the apparent tension in her thinking resulting from the observation that small classes may impede the ability to find and attract competent class counsel, and the possible result that her sub-classification scheme approach may lead to multiple small sub-classes, each requiring different counsel. She does conclude, however, that "[t]he task for courts is to find the approach that will best accommodate the values at stake and thereby best protect the rights of victims of discrimination."[104]

E. General Approach to Civil Rights

Because of the relative paucity of "hard" information concerning how Kagan would decide civil rights cases, we also looked at how she has approached civil rights issues in contexts

[99] *Id*. at 624-26.
[100] *Id.* at 626-27.
[101] *Id.* at 630.
[102] *Id.* at 630-31.
[103] *Id.* at 633-34.
[104] *Id*. at 639.

other than just affirmative action, civil rights enforcement, and her academic writings. As mentioned earlier, we are wary of drawing conclusions from documents relating to her work in the Clinton White House that may be more reflective of political considerations than legal analysis. While we think that documents that she has adopted that show her considered legal positions are the best measure of how she is likely to rule on civil rights issues if she is confirmed to the Supreme Court, we believe that consideration of positions that she has taken that generally relate to civil rights issues may help fill out the picture of what values Kagan holds, which in turn may help illumine how she will rule as a Supreme Court Justice.

Tribute to Justice Marshall

In 1993, shortly after the death of Justice Thurgood Marshall, for whom she had clerked on the Supreme Court, Kagan lauded Justice Marshall's foremost commitment to protecting the interests of the disadvantaged. Although this tribute clearly refers to Justice Marshall's viewpoint rather than her own, the admiration she expresses for his views suggests at least some sympathy for his approach to civil rights:

> [I]n Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government—to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission… And however much some recent Justices have sniped at that vision, it remains a thing of glory.[105]

Kagan's Approach to Civil Rights as Dean

Another potentially useful barometer of Kagan's general approach to civil rights is her record as Dean of Harvard Law School. As mentioned earlier, one of her first acts as Dean showed sensitivity to racial issues, when she turned down the school's first endowed chair, traditionally occupied by the Dean, instead choosing to become the first Charles Hamilton Houston Professor of Law. Kagan also has been credited by Professor Charles Ogletree, Jr. with supporting his creation of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School in 2005.[106] The Institute is dedicated to continuing Houston's work towards the elimination of racial inequalities.

As Dean, Kagan took a forceful stance against discrimination in opposing the military's "Don't Ask , Don't Tell" policy, which barred service by men and women who are openly gay, and the related "Solomon Amendment." A long-standing anti-discrimination policy at Harvard barred on-campus recruitment by employers that engaged in discriminatory hiring practices,

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[105] Elena Kagan, *In Memoriam: For Justice Marshall*, 71 Tex. L. Rev. 1125, 1129-30 (1993).
[106] Charles Ogletree, *Why Kagan is a Good Choice for the Supreme Court*, theRoot, (May 12, 2010), http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court?page=0,0&wp_login_redirect=0.

including the military. When Congress passed the Solomon Amendment, which cut funding to universities that banned on-campus military recruiting, Kagan's predecessor as Dean lifted the ban. As Dean, Kagan initially continued this policy of permitting military access to the recruiting process, though she wrote to the law school community that doing so "causes me deep distress." As she wrote in 2003 and regularly thereafter:

> "I abhor the military's discriminatory recruitment policy. The importance of the military to our society—and the extraordinary service that members of the military provide to all the rest of us—makes this discrimination more, not less, repugnant."[107]

When in 2004 the Third Circuit ruled that the Solomon Amendment was unconstitutional, Kagan reinstated the ban and denied the military access to the on-campus recruiting process. Shortly thereafter, however, the Department of Defense notified Harvard that it would withhold federal funds from the University if the law school denied the military full access at to its recruiting process, notwithstanding the Third Circuit decision, and in response, Kagan, in consultation with other University officials, allowed the military access to the on-campus recruiting process.

Kagan nonetheless maintained her legal and moral opposition to the Solomon Amendment and the military's "Don't Ask, Don't Tell" policy. She joined 39 other faculty members in signing an *amicus* brief to the Supreme Court urging affirmance of the Third Circuit decision striking down the Amendment on statutory grounds, but cautioning against adoption the circuit court's First Amendment rationale out of concern that reasoning could also be applied to thwart anti-discrimination laws. She also wrote to the law school community, explaining her actions and declaring that "I believe discrimination against gays and lesbians seeking to enter the military service is wrong—both unwise and unjust."[108]

Civil Rights Policies and Work in The White House

Kagan's work in the White House frequently touched on civil rights issues. The memos that the Lawyers' Committee has reviewed from the Clinton White House years show that Kagan most frequently seemed to advocate taking a "middle ground" on racial issues. At times this approach left some hard feelings in the civil rights community. Most notable in that respect was a debate about the "Race Initiative," and the view of some who called for a Presidential Council on race. A memo to the President from Kagan and her boss Bruce Reed said that the proposed council would be "subject to characterization as a 'do-good,' 'touchy-feely' essentially unrigorous and unserious response to the most intractable of America's social problems."[109] Kagan and Reed instead argued that concrete actions were more important; they proposed a

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[107] Email from Elena Kagan to Harvard Law School Community (October 6, 2003); *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12H/upload/12H-40-100603.pdf.

[108] Email from Elena Kagan to Harvard Law School Community (September 27, 2007); *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12H/upload/12H-15-092707.pdf.

[109] Memorandum from Elena Kagan and Bruce Reed to Erskine Bowles and Sylvia Mathews (Mar. 20, 1997), *available at* http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Subject%20File%20Series/Box%20124%20Race%20Commission%20Doc%201.pdf.

multi-day conference on racial issues to take place at the White House, a series of "town halls" led by the President on race-related issues, and policy announcements to accompany the town halls.[110] Reed and Kagan indicated that their proposal could also accommodate some attention to issues of intolerance generally, involving not only racial minorities, but also women, religious minorities, and gays and lesbians.[111]

Kagan was also involved in the issue of the sentencing disparity for crack and powder cocaine. Following an April 1997 report by the U.S. Sentencing Commission that advocated reducing the disparity, Kagan worked with Attorney General Reno and "Drug Czar" Barry McCaffrey as at the President's direction they developed a recommended course of action, which would reduce the then-existing disparity between crack and powder cocaine sentences from a ratio of 100:1 to a ratio of 10:1. Kagan and Reed advocated for what they termed the "middle position" between the Congressional Black Caucus, which favored parity, and the Republican opposition.

Senate Judiciary Committee Hearings

The Senate Judiciary Committee hearings on Elena Kagan's nomination to the Supreme court took place over a four day period (June 28th - July 1st), truncated by the death of longtime Senator Robert Byrd of West Virginia. These hearings, like those of past nominees, served primarily as an opportunity for Senators to express their own political views. Yet there were numerous occasions that revealed something of General Kagan's judicial philosophy. Much of the questioning by Republican Senators focused on General Kagan's opposition to the military's "Don't Ask Don't Tell" policy, while Democratic Senators focused primarily on their collective dissatisfaction over the Supreme Court's recent decision in the *Citizen's United* campaign finance case. Other issues covered in the hearings included the expansion of Executive authority, particularly regarding the detention of enemy combatants and the use of military tribunals, General Kagan's legal experience (or lack thereof), and questions regarding competing definitions of judicial activism and respect for *stare decisis*.

Republican Senators also leveled attacks on the judicial philosophy of one of General Kagan's mentors, Justice Thurgood Marshall—attacks that the Lawyers' Committee views as distasteful and wholly inappropriate.[112] The Lawyers' Committee is exceedingly proud to embrace and cherish Justice Marshall's legacy of protecting and ensuring the fair and just application of the civil and human rights laws to *all* Americans. Justice Marshall's steadfast belief that the federal courts are the protectors of the "despised and disadvantaged" and the guardian of our country's founding principle that "all men are created equal" is the foundation of the Lawyers' Committee's mission to protect the civil rights of all through the elimination of racial disparities in this nation.

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[110] *Id.*
[111] *Id.*
[112] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Sessions of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 3.

As a civil rights organization focused primarily on racial justice issues, the Lawyers' Committee's interests revolve around key areas such as affirmative action and race conscious remedies, employment discrimination, fair housing and community development, education, voting rights, environmental and criminal justice issues. While the hearings did not cover in detail most of these critical issues of concern, General Kagan was relatively forthcoming about her judicial philosophy on some areas. For instance, her respect for precedent was discussed in detail during questioning from several Senators. In particular, on Day 3 of the hearings, Senator Coburn attempted to lay the foundation for the overturning of *Roe v. Wade* by discussing the need to overturn bad precedents such as *Plessy v. Ferguson* in order for the Supreme Court to have reached the result it did in *Brown v. Board of Education*.[113] In response to Senator Coburn's questioning, General Kagan reiterated an explanation that she had given previously during questioning from Senator Kaufmann[114] about the circumstances under which precedent should be overturned. In the instance of *Plessy v. Ferguson*, General Kagan stated that not only had one of the major criteria for overturning precedent changed—the circumstances in the world—but in addition, a long line of previous holdings had moved the Court to a point where it was necessary to overturn the *Plessy* precedent since doctrinal support had eroded.

Also revealing was General Kagan's position on Constitutional interpretation. Despite prodding from the Senators, General Kagan was unwilling to confine her theory of Constitutional interpretation to one label, instead explaining her belief in an "evolving" Constitution as one that also includes a textualist assessment depending on the situation.[115] She stated, "In general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing."[116] Later, during questioning from Senator Cornyn, General Kagan further explained that the Court should act cautiously when interpreting evolving norms and traditions.[117] Taken together with General Kagan's responses to Senator Coburn's questions regarding the overturning of precedent, General Kagan's judicial philosophy in this arena is encouraging from a civil rights perspective. Since the majority of constitutional and statutory civil rights protections are a result of an evolving interpretation of the Constitution and the intent of the founding fathers, her responses are illuminating. Further, when combined with General Kagan's appreciation for evolving nature of societal norms and understandings of equality under the law with a healthy respect for precedent, we are hopeful that, like Justice Stevens and Justice Marshall, General Kagan's rulings will evidence a special appreciation for the protection of racial minorities and the disadvantaged in this society.

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[113] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Graham of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 100-102.

[114] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Kaufman of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 29.

[115] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Kohl of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 33.

[116] *Id.*

[117] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Cornyn of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 160-161.

During the hearings, General Kagan also expounded upon her deep respect for the role of Congress in the formation of policy and the Court's role in deferring to Congress' intent first and foremost when attempting to interpret statutes. During questioning from Democratic and Republican Senators alike, and in particular Senator Cornyn on Day 2 of the hearings over the recently passed health care legislation, General Kagan remained resolute in her deference to Congress in her role as a judge.[118] Furthermore, during a discussion with Senator Feinstein over the *Chevron* doctrine and General Kagan's views regarding agency authority, she reiterated her views of the Court's limited role in areas where there is statutory ambiguity and deference implied by Congress to agencies to properly implement a statute.[119]

However, while General Kagan was forthcoming in some key areas mentioned above, her responses in the areas of criminal sentencing disparities and the death penalty, the constitutionality of the Voting Rights Act, and generally regarding the constitutionality of race-conscious remedies were less promising. During a lengthy discussion with Senator Durbin over racial disparities in criminal sentencing and the ultimate use of the death penalty, General Kagan maintained her response given during her confirmation hearings for Solicitor General that she believes the constitutionality of the death penalty is settled law, in contrast to the views of Justice Stevens or her mentor Justice Marshall.[120] She reiterated this position despite Senator Durbin's explanation about the evolution of Justice Stevens position in light of the racially disparate impact of our nation's criminal sentencing laws. On the other hand, in an exchange with Senator Cardin, General Kagan declined to reaffirm the constitutionality of the Voting Rights Act, stating only that it is a major historical achievement. Furthermore, General Kagan declined to discuss her beliefs regarding the use of race-conscious measures, particularly as applied to affirmative action programs. Questions from Senator Franken about the use of the Equal Protection Clause of the 14th Amendment to protect against racial discrimination opened the door, but General Kagan limited her response to an agreement with Senator Franken that "the Equal Protection Clause exists to ensure against discrimination on disfavored bases, …and the archetypal example is race."[121] In light of the lack of record regarding General Kagan's own views regarding the use of race-conscious versus race-neutral remedies, it would have been helpful for her to have expounded upon this issue more, as she did with other issues.

A few other issues of special concern to the Lawyers' Committee were also addressed, including access to courts and the use of mandatory arbitration clauses, the Lilly Ledbetter Act, and access to *pro bono* legal services by indigent communities. Perhaps not surprisingly, General Kagan's responses to questions on these issues were not particularly illuminating. She focused primarily on the process of statutory interpretation and the Court's requirement to defer

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[118] *Id.* At 165.
[119] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Feinstein of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 62.
[120] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Durbin of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 174.
[121] *The Continuation of The Nomination of Elena Kagan to the Supreme Court of the United States: Hearing Before the Senate Judiciary Committee*, (forthcoming), (2010), (questioning by Senator Franken of Elena Kagan) *available at* http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/tra, at 150.

to Congressional intent. While somewhat helpful, in contrast to her testimony concerning the *Citizens United* case, General Kagan did not opine upon these issues more to indicate whether the rulings by the Court were contrary to long time precedent.

IV. CONCLUSION

As stated earlier, the Lawyers' Committee adopted a new standard for analyzing Supreme Court nominees in 2009 in an effort to more proactively provide commentary on a nominee's record. Our standard specifically requires the Lawyers' Committee to evaluate whether the nominee's record "demonstrates that the nominee possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws."

Prior to the confirmation hearings for General Kagan, the Lawyers' Committee declined to comment in order to provide General Kagan an opportunity to address some critical issues still outstanding in her record on civil rights. Questions on various topics were submitted to Senate Judiciary members and to the White House. We were hopeful that General Kagan would provide additional insight into her judicial philosophy and views on such issues as the use of race conscious remedies particularly to resolve disparate treatment against racial minorities in education, employment and housing, and voting, and the disparate impact upon minorities of the criminal justice system. While we were thankful that General Kagan's testimony did provide some additional information, the scope was still limited in the civil rights areas most critical to the Lawyers' Committee. Furthermore, of those areas that General Kagan did opine, we were left with some mixed views concerning her appreciation for the application of laws upon racial minorities.

Thus, based on our review of the available information, and in compliance with our 2-part nominations standard, the Lawyers' Committee concludes that Solicitor General Kagan fulfills the standards for prong 1, however there is not sufficient information to determine whether she meets prong 2. General Kagan possesses exceptional legal ability, extensive knowledge of the law, a genuine openness to the arguments of others, a high degree of integrity, a remarkable ability to reach across ideological boundaries, and a commitment to the democratic process. Still, we believe that General Kagan has not developed a civil rights record sufficient enough to permit an assessment of whether she meets our exacting standards on civil rights; therefore we cannot fully comment on her nomination.

It is the Lawyers' Committee's hope and expectation that General Kagan will in fact live up to our exacting standard on civil rights so that the rights of the dispossessed and disadvantaged will not go overlooked, but instead that this Supreme Court, will be a beacon of light in the quest to achieve racial justice and equal opportunity for all.