

SENATE COMMITTEE ON THE JUDICIARY HOLDS A HEARING ON THE
ELENA KAGAN NOMINATION

JUNE 29, 2010

SPEAKERS:

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WITNESSES:

ELENA KAGAN,
NOMINATED TO BE AN ASSOCIATE JUSTICE OF
THE U.S. SUPREME COURT

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LEAHY: Good morning, everyone.

Today -- today, Justice John Paul Stevens' resignation from the Supreme Court takes effect, and I appreciated your recognition of his service to the country in your opening statement, Solicitor General Kagan.

He was the first person -- the first Supreme Court nomination I was able to vote on as a very young and very junior member of the United States Senate. But you spoke eloquently about the rule of law, securing the blessings of liberty, about the Constitution, and about your respect for all three branches of our democratic government. And I appreciate your pledge to consider every case impartially, modestly, with a commitment to principle, and in -- and in accordance with law.

So this morning, we begin our questioning. Senator Sessions and I talked about this. Each senator -- Republicans and Democrats -- will have a 13-minute round, and we will go alternate back and forth. So I will begin the first round.

Solicitor General Kagan -- and you can start the clock -- Solicitor General Kagan, you spoke yesterday about your parents, children of immigrants, first in their families to attend college. I was struck when you said that your mother didn't learn English until ready to go to school, and I can equate (ph) with that, as it's the same with my mother and my wife.

Before we get to questions about the important role that the Supreme Court plays in American lives, do you want to share with us some additional thoughts about the values your parents taught you that put you on the path to teaching and law and public service? Because that may give us a better idea of who you are.

KAGAN: Oh, gosh, Chairman Leahy, thank you for giving me that opportunity. That's -- that's a wonderful opportunity.

My parents, of course, were -- I mean, as they were loving, wonderful parents, but they were also people who worked hard for their communities. And I think that's what -- what I most took away from them, is the -- the value of -- of -- of serving the communities that you live in, of serving other people.

And I guess I -- I got a little bit from each side. My father, I said, was a lawyer. He was a lawyer for ordinary people. He -- he was the kind of lawyer who, if you needed a will drawn up, he would draw up your will, and if you had problems on your taxes, he would help you with that.

And then one of the things that he did quite a lot of was he helped tenants in New York City's -- the neighborhood we lived in was in the process of some change as I was growing up, and -- and many people were sort of being forced out of their homes. And -- and he made it really part of his legal work to ensure that either they could stay in their homes or at least, if -- if they did need to move to another neighborhood, they could -- they could take something with them to establish a good life there.

And he was also a person who spent an enormous amount of time thinking about that neighborhood. He was involved in -- in lots of community boards and citizen groups of various kinds, thinking about environmental projects and land use projects. He really treated that neighborhood of New York City as just -- you know, he -- he just so much cared about the welfare of it and -- and poured his heart and soul into trying to improve it.

And I think what I learned from him was just the value of public service, was just the value of doing what you can in your neighborhood or in your nation or wherever you can find that opportunity, to -- to help other people and to serve the nation, so that's -- that's what I most took away from my father.

My -- my mother was -- she -- I said yesterday she was a kind of legendary teacher. She -- she died only a couple of years ago. And my brothers and I, we expected a small funeral. We expected not very many people to attend, a lot of -- I don't have a large family.

And, instead, just tons and tons of people showed up, and we couldn't figure out who they all were. And it turned out that these people who were then middle-aged, you know, 30-year-olds, 40-year-olds, whatever, they had had my mother as a sixth-grade teacher decades ago, and they were people who just wanted to come and pay their respects, because they kept on coming up to me and my brothers and saying, "At the age of 12, your mother taught me that I could do anything."

And she was really demanding. She was a really tough teacher. You know, it was not -- you didn't -- you didn't slide by in Mrs. Kagan's class. But -- but she -- she -- she got the most out of people, and she changed people's lives because -- because of that.

And if I look at my own career in this kind of strange way, not planned, but in this sort of strange way, I think, you know, part of my life is my father and part of my life is my mother, that part of my life has been in public service -- I've been really blessed with the opportunities I've had to -- to work in government and to serve this nation -- and then part of my life is teaching, which I take enormous pleasure and joy from.

I mean, the -- I'm -- I'm looking over your right -- your left shoulder, right on my side, and there's a student of mine right there, and -- and maybe there are some other students that are around the room. And -- and it's -- it's a kind of great thing.

LEAHY: We're doing our best to make Jeremy (ph) blush (inaudible)

(LAUGHTER)

But, you know, these -- these things that I -- I mean, each one of us I think can speak about what our parents -- what they brought to us. And it seems to me they gave you some pretty strong values.

And so we -- that speaks about who you are as a person. And now we go to some of your legal abilities. And some have criticized your background or your legal arguments, even going to what did you write on -- on college papers.

The chairman of the Republican National Committee criticized you last month for agreeing with Justice Thurgood Marshall's observation that our Constitution as originally drafted was imperfect.

The criticism surprised me, because everything you read about the founders, they knew that they would lay down something that would not cover every foreseeable thing. I mean, how could they possibly foresee what the country is today? They were -- they wrote in broad terms. They couldn't foresee every challenge.

So what's the -- what's your response to this criticism of you that is made because you agreed with Justice Marshall? How -- how would you describe the way the Constitution has been amended since it was originally drafted?

KAGAN: Well, Justice Leahy, the framers were incredibly wise men. And if we -- if we always remember that, we'll do pretty well, because part of their wisdom was that they wrote a Constitution for the ages.

And this was very much in their mind; this was part of their consciousness. You know, even that phrase that I quoted yesterday from the preamble of the Constitution, I said the Constitution was to secure blessings of liberty. I didn't quote the -- the next part of that phrase. It said blessings of liberty for themselves and their posterity.

So they were looking towards the future. They were looking generations and generations and generations ahead and knowing that they were writing a Constitution for all that period of time and that life -- and that circumstances and that the world would change, just as it had changed in their own lives very dramatically, so they knew all about change.

And they wrote a Constitution, I think, that has all kinds of provisions in it, so there are some that are very specific provisions. It just says what you're supposed to do and how things are supposed to work.

So it says, to be a senator, you have to be 30 years old. And -- and that just means you have to be 30 years old, and it doesn't matter if people mature earlier. It doesn't matter if people's life spans change. You just have to be 30 years old, because that's what they wrote, and that's what they meant, and that's what we should do.

But there are a range of other kinds of provisions in the Constitution of a much more general kind. And -- and those provisions were meant to be interpreted over time, to be applied to new situations and new factual contexts.

So the Fourth Amendment is a great example of this. It says, "There shall be no unreasonable searches and seizures."

KAGAN: Well, what's unreasonable? That's the question.

The framers could have given, like, a whole primer on police practices -- you know, which searches were reasonable and which searches weren't reasonable, and lots of different rules for saying that. But they didn't do that.

And I think that they didn't do that because of this incredible wisdom that they had; that they knew that the world was going to change. And that, you know, they didn't live with bomb-sniffing dogs and with heat-detecting devices...

LEAHY: And computers...

KAGAN: ... and computers, and all these questions that judges, courts, everybody is struggling with -- police in the Fourth Amendment context.

And I think that -- that they -- they laid down -- sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. So in that sense, we are all originalists.

LEAHY: And we also made changes. In the -- in the Bill of Rights, my own state of Vermont didn't join the Union until they saw that the Bill of Rights was going to be ratified. We did the -- a 19th Amendment in expansion of votes for women, the 26th Amendment, the -- allowing 18-year-olds to go. We've seen some major changes over the years.

Yesterday I talked about how the Supreme Court interprets *Plessy v. Ferguson*. It was overruled by *Brown v. Board of Education* -- same Constitution.

But if we -- people realize how changes are in society. I -- I can't imagine anybody saying we should go back to *Plessy v. Ferguson*, because that was -- that was decided first.

I think -- I do recall you being a special counsel with Senator Biden on this committee during the Supreme Court confirmation hearing. I was here -- I was a little bit further down the -- down the road at the time. But you wrote a law review article and book review after in which you argued that these proceedings should be occasions to engage in a meaningful discussion of legal issues.

Now, you set the standard.

(LAUGHTER)

You probably re-read those words. How are...

(CROSSTALK)

KAGAN: Many times.

(LAUGHTER)

LEAHY: I'll bet. I'll bet. As have I, and I guarantee you...

KAGAN: And do you know what?

LEAHY: ... every single member of this committee.

KAGAN: They've been read to me many times too.

(LAUGHTER)

LEAHY: And probably will again. How are you going to live up to that standard?

KAGAN: Senator Leahy, before I answer that question, may I say a little bit more about what you started with, about constitutional changes?

LEAHY: Sure.

KAGAN: ... Just to -- just to show my commitment to being open, all right.

LEAHY: Go ahead.

KAGAN: But you -- you said something which sort of triggered a thought in me, and I just wanted to -- as you said, there are all these many changes that have happened to the Constitution.

And I think it's important to realize that those changes do come in sort of two varieties. One is the formal amendment process. And I think it was Senator Cornyn yesterday who had talked about the formal amendment process. And that's tremendously important.

So, you know, when Thurgood Marshall said that this was a defective Constitution, you know, he was talking about the fact that this was a Constitution that counted slaves as three-fifths of a human being, that didn't do anything about that original sin of our country, and the 14th Amendment changed that. The 14th Amendment was an enormous break after the Civil War, and -- and created a different Constitution for America. So partly the changes come in that way.

But -- but partly, they -- they come outside the formal amendment process, as well. And what you said about Plessy and -- and Brown is absolutely right. That if you look at the specific intent of the drafters of the 14th Amendment, they thought that the 14th Amendment was perfectly consistent with segregated schools.

I mean, you just have to -- you can't really argue otherwise as an historical matter.

But in Brown, the court said otherwise. And, you know, step by step by step, decision by decision, in large part because of what Justice Marshall did, you know, we got to a place where the court said it's inconsistent with the principle of equal protection of the laws that the drafters of the 14th Amendment laid down; is inconsistent with that principle to have segregated schools.

So -- so that's the way in which change can happen, as well.

Now, to go to your real question -- and I -- I apologize for that digression. I have looked at that -- at that book review many times. And -- and been pointed to it. And here's what I think. I still think that the basic points of that book review were right. And the basic points were that the Senate has a very significant role to play in picking Supreme Court justices. That it's important who serves on the Supreme Court. That everybody should treat it as important. And that the Senate should have a constitutional responsibility and should take that constitutional responsibility seriously.

And also that it should have the information it needs to take that responsibility seriously. And part of that is getting some sense, some feel of how a nominee approaches legal issues, the way they think about the law. And I guess that's my excuse for giving you a little bit more, even than you wanted, about constitutional change.

But -- but I would say that there are limits on that. Now some of the limits I talked about in that article itself. I mean, that article makes very clear that it would be inappropriate for a nominee to talk about how she will rule on pending cases or -- or on cases beyond that that might come before the court in the future. So the article was very clear about that line.

Now, when I came before this committee in my S.G. hearing, Senator Hatch and I had some conversation -- because Senator Hatch said to me -- I'm sorry he's not here -- he said to me he thought that I had the balance a little bit off. He said, you know, in addition -- he basically said, it's not just that people can ask you about cases coming to -- that come before the court. They can ask you a range of questions that are a little bit more veiled than that, but they're really getting at the same thing. And if it's not right to say how you would rule on a case that's going to come before the court or it might, then it's also not right to ask those kinds of questions which essentially ask you the same thing without doing so in so many words.

And I went back and forth a little bit with Senator Hatch both in these hearings and on paper, and I basically said to Senator Hatch that he was right, that I thought that I did have the balance a little bit off, and that I skewed it too much toward saying that answering is appropriate even when it would, you know, provide some kind of hints.

And I think that that was wrong. I think that, in particular, that it wouldn't be appropriate for me to talk about what I think about past cases -- you know, to grade cases -- because those cases themselves might again come before the court.

LEAHY: Well, actually, that would go into another area. You've been solicitor general. You've argued a number of cases before the Supreme Court.

The last person nominated directly to the Supreme Court not from a judgeship but from the administration was when Justice Rehnquist was working for the Nixon administration and went directly to the Supreme Court.

And then -- I wasn't in the Senate at that time, but I was there when he was being nominated for chief justice. And I asked him about his refusal to recuse himself from a case called *Laird v. Tatum*. Now the *Laird* case involved the Nixon administration's surveillance of Americans.

As the Justice Department's legal expert, was working with the Justice Department for the Nixon administration, he testified before Congress about that case. But then after his confirmation, he was probably a five justice majority in the very case in which he had testified, and he voted to dismiss the complaint, alleging unlawful surveillance of lawful citizens' political activity.

Now I realize Supreme Court justices have to make up their own mind -- back and forth with Justice Scalia about some things with his relationship with the former vice president and then ruling on cases involving him. I regularly ask questions of nominees, not just for the Supreme Court, but further courts about potential recusals.

Now, Senator Sessions and I sent you a questionnaire. And in that we had the question of recusal. And you answered -- appears to me you take this very seriously. Tell me about what -- what principles are you going to use to make recusal decisions, if you can do it just briefly? But then tell us some of the cases where you anticipate you are going to have to recuse?

KAGAN: Senator Leahy, I think certainly, as I said in that questionnaire answer, that I would recuse myself from any case in which I've been counsel of record at any stage of the proceedings, in which I've signed any kind of -- of brief.

And I think that there are probably about 10 cases -- I haven't -- I haven't counted them up particularly, but I think that there are probably about 10 cases that are on the dockets next year in which that's true, in which I -- I've been counsel of record on a petition for certiorari or some other kind of pleading. So that's a flat rule.

In addition to that, I said to you on the questionnaire that I would recuse myself in any case in which I'd played any kind of substantial role in the process.

I think that that would include -- I'm going to be a little bit hesitant about this, because one of the things I would want to do is -- is talk to my colleagues up there and make sure that this is what they think is appropriate, too -- but I think that that would include any case in which I've officially formally approved something.

So one of the things that the solicitor general does is approve appeals or approve amicus briefs to be filed in lower courts or approve interventions.

LEAHY: The -- I wish you would look seriously at that. I was really shocked by former Chief Justice Rehnquist's position on -- on a later case. I thought that was almost an open-and-shut question for recusal.

The reason I mention it, the Supreme Court also has to have the respect of the American people. And certainly people can expect the Supreme Court to rule on some case where they may or may not agree with them, but so long as they have respect for the court, then they'll understand that.

If they see justices involved in cases in which they had a -- a financial interest, which seems pretty clear-cut, or -- or other direct interests, and then they rule on them, you can imagine this erodes the credibility of the court. And I'm very concerned about that, no matter -- whether it's a Republican president's nominee or a Democratic president's nominee.

Two years ago, in the District of Columbia v. Heller, the Supreme Court held the Second Amendment guarantees to an American's individual right to keep and bear arms. I'm -- I'm a gun-owner, as are many people in Vermont, and I agreed with the Heller decision.

And just yesterday, McDonald v. City of Chicago, the court decided the Second Amendment right established in Heller is a fundamental right that applies to the states, as well as the federal government.

Now, that's not going to have any effect one way or the other in -- in Vermont, because we don't have gun laws in Vermont, except during hunting season. We try to give the deer a fighting chance. But, otherwise, there are no -- no rules.

Is there any doubt after the court's decision in Heller and McDonald that the Second Amendment to the Constitution secures a fundamental right for an individual to own a firearm, use it for self-defense in their home?

KAGAN: There is no doubt, Senator Leahy, that is binding precedent entitled to all the respect of binding precedent in -- in -- in any case. So that is settled law.

LEAHY: As solicitor general, did you have a role in the president's domestic or foreign policy agenda?

KAGAN: The solicitor general does not typically take part in policy issues. And certainly -- I mean, the only policy issues I think that I might have taken part in -- and -- and these are policy issues that would only overlap with litigation issues -- are some national security issues. But -- but, otherwise, you know, the solicitor general really is a legal officer.

LEAHY: And if you -- if you were, though, involved in domestic or foreign policy agenda, would that not be something that you'd want to consider in the issue of recusal? I mean, you mentioned national security issues, for example.

KAGAN: Right. I think that anything that I substantially participated in as a government official that's coming before the court I should take very seriously, as you say, the appropriateness of recusal.

LEAHY: Now, I -- I know that when Chief Justice Roberts and Justice Alito were before this committee for their nomination hearings, they'd worked for Republican presidents. They assured senators, as lawyers for a presidential administration, they were representing the views of the president. All my friends on this side of the aisle thought that was fine.

And the reason I mentioned that is I was concerned, as some were saying, that almost a different standard, because back a number of years ago, you worked for the Clinton administration. Would you agree with Chief Justice Roberts and Justice Alito that, as a lawyer working for a presidential administration, the policies you worked to advance were the views and policies of the president for whom you worked?

KAGAN: Absolutely, Senator Leahy. I -- I worked for President Bill Clinton, and we tried to implement his policy views and objectives.

LEAHY: Now, let me ask you this. We've heard talk about Harvard Law School and military recruiting when you were a dean, and by enforcing the longstanding nondiscrimination policy, you had provided military recruiters with access to students coordinated by the Harvard Law veterans association that had been successfully used for years under your predecessor, Dean Clark, with the approval of military recruiters and the Department of Defense.

Did you ever bar recruiters for the U.S. military from access to students at Harvard Law School while you were dean?

KAGAN: Senator Leahy, military recruiters had access to Harvard students every single day I was dean.

LEAHY: Well, let me ask you this. Did the -- did the -- while you were there, did the number of students recruited go down at all while you were -- while you were dean?

KAGAN: I don't believe it did, Senator Leahy, so -- I'm confident that the military had access to our students and our students had access to the military throughout my entire deanship.

And -- and that's incredibly important, because the military should have the best and brightest people it can possibly have in its forces. And -- and I think -- you know, I -- I said on many, many occasions that this was a great thing for our students to think about doing in their lives, that this is the most important and honorable way any person can serve his or her country.

LEAHY: I -- it's always been my experience, also, if somebody wants to join the military, they usually are pretty motivated to join the military. And my youngest son joined the Marine Corps out of -- out of high school. There weren't recruiters on the high school campus, but he was able to find where the recruiter -- recruiter was in downtown Burlington and walked over there and signed up. My wife and I were very proud for him for -- for doing that.

But here there's been this implication given -- that's why I want you to clear this up -- implication given that somehow military recruiters couldn't recruit Harvard students. That was not the case, is that correct?

KAGAN: That was not the case, Senator Leahy. The -- the only question that ever came up -- as you stated earlier, this was a balance for the -- the law school, because on the one hand, we wanted to make absolutely sure that our students had access to the military at all times, but we did have a very longstanding -- going back to the 1970s -- anti-discrimination policy, which -- which said that no employer could use the Office of Career Services if that employer would not sign a nondiscrimination pledge that applied to many categories, race and gender and sexual orientation and actually veteran status, as well. And the military could not sign that pledge.

LEAHY: Because of the "don't ask/don't tell"?

KAGAN: Because of the "don't ask/don't tell" policy.

LEAHY: Which -- which the chairman of the Joint Chiefs of Staff now says should be repealed. I read the speech you gave to graduates at West Point three years ago. You said that military service is the noblest of all professions, and those cadets serve their countries in this most important of all ways. That didn't sound very anti-military to me.

Tell me why you said that, what you did at West Point.

KAGAN: Well, I said it because I believe it. I was so honored to be invited to West Point. They had -- a mandatory part of their curriculum -- and all students take a constitutional law course, and they invite a person each year to talk to the students about any legal subject, and it was really the greatest honor, I think, I've ever gotten, to be asked to be that person.

And I went up, and -- and I talked to the West Point students and faculty about -- about something that I talked about yesterday, really, which was about the rule of law and -- and about how it applied in the military context.

KAGAN: And I was -- I was -- I just -- I love that institution, the faculty and the students there. It was an incredible experience for me.

But, you know, in addition, I mean, I tried in every way I could to make clear to veterans of the military at Harvard Law School and people who were going to go into the military how much I respected their service, how much I thought that they were doing the greatest thing that anybody could do for their country.

LEAHY: Well, I -- I tend to agree. I know we felt that way -- my wife and I felt that way about our son. We worried about him in the Marine Corps, but we were so proud of what he was doing.

In fact, speaking of Marines, I read a May 21 Washington Post op-ed from Robert Merrill. He's a captain in the U.S. Marine Corps. He's a 2008 Harvard Law graduate. He's serving as a legal adviser to a Marine infantry battalion in southern Afghanistan. I've been to that part of Afghanistan with our troops. It is not an easy place to be.

He writes, "If Elena Kagan is anti-military, she certainly didn't show it. She treated the veterans at Harvard like VIPs. She was a fervent advocate of our veterans association."

He also writes, "I received perhaps the most thoughtful thanks of all just before graduating from Harvard Law School. The supposedly anti-military Elena Kagan sent me a handwritten note thanking me for my military service and wishing me luck in my new life as a judge advocate."

I want to thank you for doing that, too, and I will put in the record Captain Merrill's -- Captain Merrill's op-ed.

KAGAN: Senator Leahy, that was -- this has been a sort of long process, this process, and sometimes an arduous one. I've only cried once during this process, and I cried when I woke up one morning and I read that op-ed from Captain Merrill, that it meant just an enormous amount to me. He's a magnificent man doing great things for our country, and -- and his praise meant more to me than anybody's.

LEAHY: Well, I haven't met him, but I was very touched by it.

Senator Sessions?

SESSIONS: Thank you, Mr. Chairman. And I value our relationship. And we've disagreed over documents and a few things, but I believe you've tried to handle this committee in a fair way, and nobody's had more experience at it.

And, fundamentally, I hope that we have, Dean Kagan, a good hearing. I hope that you can feel free to tell us precisely how you think so we can evaluate what you might be like on the bench.

We can have brilliant and wonderful people, but if their approach to judging is such that I think allows them not to be faithful to the law, to not take the -- be able to honor that oath, which is to serve under the Constitution and laws of the United States, then we've got a problem. And I don't think that's judging. I think that becomes politics or law or something else. And so I would say that to you.

I look forward to all of our members asking a number of questions to probe how you will approach your judgeship. Let me ask you this...

LEAHY: Incidentally, thank you for those kind words.

SESSIONS: Thank you, Mr. Chairman. And I meant that.

One thing before I get started, I would like to ask about your discussion of constitutional change earlier. You indicated that there is an amendment process in the Constitution, there are two ways to do so in the Constitution. Is there any other way than those two ways that the Constitution approves to change the Constitution?

KAGAN: Well, Senator Sessions, the Constitution is an enduring document. The Constitution is the Constitution. And the Constitution does not change except by the amendment process.

But as I suggested to Chairman Leahy, the Constitution does over time -- we're asked -- courts are asked to think about how it applies to new sets of circumstances, to new problems, to things that the framers never dreamed of. And in applying the Constitution case by case by case to new circumstances, to changes in the world, the constitutional law that we live -- live under does develop over time.

SESSIONS: Well, developing is one thing. And many of the provisions, as you noted, they're not specific. But they're pretty clear, I think, but not always specific. But you -- you're not empowered to alter that document and change its meaning. You're empowered to apply its meaning faithfully in new circumstances. Wouldn't you agree?

KAGAN: I do agree with that, Senator Sessions. That's the point I was trying to make, that -- however inartfully -- that you take the Fourth Amendment and you say there's unreasonable searches and seizures and that provision stays the same unless it's amended. That's the provision.

And then the question is, what counts as an unreasonable search and seizure? And new cases come before the court and the court tries to think about, to the extent that one can glean any meaning from the text itself, from the original intent, from the precedents, from the history, from the principles embedded in the precedent, and the court sort of step by step by step, one case at a time, figures out what the Fourth -- how the Fourth Amendment applies.

SESSIONS: Well, I do believe that there's some out there who think the court really has an opportunity to update the Constitution and make it say what they'd like it to say.

I know we've seen a bit of a revival in the idea of the progressive legal movement that people in the early 20th century advocated views for changing America. They felt the Constitution often blocked them from doing that, and they were very aggressive in seeking ways to subvert or get around that Constitution.

Your former colleague at University of Chicago, Richard Epstein, said any constitutional doctrine that stood in the way of the comprehensive social or economic reforms -- he's referring to the progressives -- had to be rejected or circumvented.

And he noted that the progressive influence continues to exert itself -- he's talking about today -- long past the New Deal in modern Supreme Court decisions that address questions of federalism, economic liberties and takings for public use.

I believe that's a dangerous philosophy. I believe that's a philosophy not justified by any judge on the court. And I'm worried about the trends. I think the American people are.

Greg Craig, the former chief counsel to President Obama, who's known you for some time, I understand, said of you, "She is largely a progressive in the mold of Obama himself," close quote. Do you agree with that?

KAGAN: Well, Senator Sessions, I'm not quite sure how I would characterize my politics. But one thing I do know is that my politics would be, must be, have to be completely separate from my judging.

And I -- I agree with you to the extent that you're saying, look, judging is about considering a case that comes before you, the parties that comes before you, listening to the arguments they make, reading the briefs they file, and then considering how the law applies to their case -- how the law applies to their case -- not how your own personal views, not how your own political views might suggest, you know, anything about the case, but what the law says, whether it's the Constitution or whether it's a statute.

Now, sometimes that's a hard question, what the law says, and sometimes judges can disagree about that question. But the question is always what the law says.

And if it's the -- if it's a Constitutional question, it's what the text of the Constitution says, it's what the history says, the structure, the precedent. But what the law says, not what a judge's personal views...

SESSIONS: Well, I agree. But the point I just wanted to raise with you is that this idea, this concept of legal progressivism is afoot.

I noticed E.J. Dionne in yesterday's Washington Post had an article, started off, second paragraph, is saying, "Democratic senators are planning to put the right of citizens to challenge corporate power at the center of their critique of an activist conservative judging, offering as a case that has not been" -- "offering a case that has not been fully aired since the great progressive era of Justice Louis Brandeis.

And I think we do have this national discussion going on about a revival of progressivism.

SESSIONS: Let me ask you about this. Vice President Biden's chief of staff, Ron Klain, who served on chief counsel of this committee, a skilled lawyer, was vice president -- chief of staff to Vice President Gore also, I believe, who's known you for a number of years, said this about you: "Elena Kagan is clearly a legal progressive. I think Elena is someone who comes from the progressive side of the spectrum. She clerked for Judge Mikva, clerked for Justice Marshall, worked in the Clinton administration, in the Obama administration. I don't think there's any mystery to the fact that she is. As I said, a more progressive role than not," close quote.

Do you agree with that?

KAGAN: Senator Sessions, it's absolutely the case that I have served in two Democratic administrations. And I think...

SESSIONS: No, but I'm asking, do you agree with the characterization that you're a legal progressive?

KAGAN: Senator Sessions, I honestly don't know what that label means. I worked in two Democratic administrations. Senator Graham suggested yesterday, and I think he's right, that you can tell something about me and my political views from that. But as I suggested to you, that my political views are one thing...

SESSIONS: Well, we agree with you, exactly, that you -- you should not be condemned for being a political believer and taking part in the process and having views. But I'm -- I'm asking about his firm statement that you are a legal progressive, which means something. I think he knew what he was talking about. He's a skilled lawyer who's been in the midst of the great debates of this country about law and politics, just as you have.

And so I ask you again: Do you think that is a fair characterization of your views? Certainly, you don't think he was attempting to embarrass you or hurt you in that process.

KAGAN: I love my good friend, Ron Klain, but I guess I think that people should be allowed to label themselves. And that's -- you know, I don't know what that label means and so I guess I'm not going to characterize it one way or the other.

SESSIONS: Well, I would just say, having looked at your overall record, having considered those two people who know you very well, I think you have to classify you -- I would have to classify you as someone in the theme of the legal progressive.

Now, as you -- one of the things that we want to test, I guess, is your willingness to follow the law even if you might not agree with it. And Senator Leahy has asked you about the Harvard and the military. Isn't it true, isn't it a fact that Harvard had full and equal access to the recruiting office, the Office of Career Services when you became dean? And isn't it true -- well, when you became dean?

KAGAN: Senator Sessions, the military had full access to our students at all times, both before I became dean and during...

(CROSSTALK)

SESSIONS: That's not the question. I know that...

LEAHY: Senator, let her answer the question.

SESSIONS: All right, but -- you know, you -- you -- go ahead.

KAGAN: So the history of this is Harvard did have this antidiscrimination principle and for many, many years, my predecessor, who is Bob Clark, had set up a system to ensure military access, but also to allow Harvard to comply with its antidiscrimination policy which prohibited the Office of Career Services from providing assistance to employers that could not sign the antidiscrimination pledge.

And the accommodation that Bob worked out was that the veterans' organization would instead sponsor the military recruiters. So the only thing that was at issue was essentially the sponsoring organization, whether it was the Office of Career Services or instead the student veterans' organizations.

SESSIONS: Please, let me follow up on that.

But in August 26 of 2002, Dean Clark, your immediate predecessor, acquiesced when Harvard's financing had been threatened by the federal government for failure to comply with the law which requires not just access, but equal access to the offices on campus, he replied in this fashion to the government: "This year and in future years, the law school will welcome military -- the military to recruit through the Office of Career Services," closed quote.

So that was the rule when you took office, was it not?

KAGAN: It was the rule when I took office and it remained the rule after I took office. For many years, DOD, the Department of Defense, had been very...

SESSIONS: Well, not for many years. How many? Well, go ahead.

KAGAN: For a number of years, for a great number of years, the Department of Defense had been very accepting, had approved the accommodation that we had worked out. You're quite right that in 2002, DOD came to the law school and said, "Although this accommodation has been acceptable to us so far, it's not acceptable any longer and instead we want the official Office of Career Services assistance."

SESSIONS: But before -- and Harvard acquiesced and agreed to do so.

KAGAN: And Dean Clark agreed to do so and that continued...

SESSIONS: On a direct threat of cutting off of funds and otherwise he indicated in his statement he would not have done so.

Now, when you became dean, you personally opposed the "don't ask/don't tell" policy and felt strongly about it, did you not?

KAGAN: I do oppose the "don't ask/don't tell" policy.

SESSIONS: And you did then?

KAGAN: And I did then.

SESSIONS: And you in '03, not long after you had been, became president (sic), you said, quote, "I abhor the military's discrimination recruitment policy," close quote. I consider it, quote, "a profound wrong, a moral injustice of the first order," close quote.

And you said that not -- within six months or so of becoming dean. And that was an e-mail you sent to the entire law school.

KAGAN: Senator Sessions, I have repeatedly said that I believe that the "don't ask/don't tell" policy is unwise and unjust. I believed it then and I believe it now. And we were trying to do two things. We were trying to make sure that military recruiters had full and complete access to our students, but we were also trying to protect our own antidiscrimination policy and to protect the students whom it is -- whom it -- the policy is supposed to protect, which in this case were our gay and lesbian students. And we tried to do both of those things.

SESSIONS: Well, you couldn't do both, as it became clear as time went on. In fact, there was a protest on campus the next year and you participated in that protest and spoke out saying, quote, "I'm very opposed to two government policies that directly violate our policy of nondiscrimination and directly impact our students. The first is 'don't ask/don't tell'; the second one is the Solomon Amendment, which effectively forces educational institutions to make exceptions to their nondiscrimination policy."

So you sent that out to the -- you said that at that meeting.

And in addition to that, a lawsuit was filed in a distant circuit, the Third Circuit, and you participated in the filing of a brief attacking the "don't ask/don't tell" policy. Is that correct?

KAGAN: Senator Sessions, that is not quite correct. The lawsuit itself brought a constitutional challenge to the "don't ask/don't tell" -- to the Solomon Amendment. We did not participate in -- in that challenge. What the brief that I filed did do was to argue -- try to argue that Harvard's accommodation, which allowed -- which, you know, welcomed the military on campus, but through our veterans' organization -- what we tried to argue was that that organization was consistent with the Solomon Amendment. And that's what we argued to the Third Circuit.

SESSIONS: Well, and eventually the Supreme Court did not agree with that. But after the Third Circuit ruled two to one, questioning the constitutionality of the statute, you immediately, the very next day, changed the policy at Harvard and barred the military from the Office of Career Services, the equal access the Solomon Amendment had required. Is that correct?

KAGAN: Senator Sessions, after the Third Circuit ruled the Solomon Amendment unconstitutional, and the Third Circuit was the only appellate court to have issued a decision on that question and did rule the Solomon Amendment unconstitutional, I thought it appropriate at that point to go back to what had been the school's longstanding policy, which had been to welcome the military onto the campus, but through the auspices of the veterans' organization, rather than through the offices of our Office of Career Services.

SESSIONS: Well, the veterans weren't interested in taking on that burden, and that was not the equal access that the Solomon Amendment, which I worked on in the past, required. Congress, frankly, was very frustrated at the law school. We passed four or five versions of the Solomon Amendment to get around every maneuver that occurred on the campuses.

Now, isn't it a fact that the mandate or the injunction never issued by the Third Circuit, that the Third Circuit holding did not apply to Harvard at the time you stopped complying with the -- the Solomon Amendment? And isn't it a fact that you were acting in violation of Harvard's agreement and the law when you reversed policy?

KAGAN: Senator Sessions, we were never out of compliance with the law. Nobody ever suggested that Harvard should be sanctioned in any way.

The only question was whether Harvard should continue -- had continued to remain eligible for federal funding. And after DOD came to us and after DOD told us that it wanted law schools to essentially ignore the Third Circuit decision, that it wanted -- that it was going to take that decision to the Supreme Court, and that it wanted law schools to continue to do what they had been doing, we did change back, we did precisely what DOD asked us to do, and DOD never withheld...

(CROSSTALK)

SESSIONS: Well, you did not do -- Ms. Kagan, you didn't do what the DOD asked you to do. Just answer this -- put your legal hat on for a second. The Third Circuit opinion never stayed the enforcement of the Solomon Amendment at Harvard, did it? Did that law remain in effect?

KAGAN: Senator Sessions, the -- the question was...

SESSIONS: No, that's my question to you. Did the law remain in effect at all times at Harvard?

KAGAN: The Solomon Amendment remained in effect, but we had always thought that we were acting in compliance with the Solomon Amendment. And for many, many years, DOD agreed with us.

After the Third Circuit, I thought it was appropriate to go back to our old policy, which previously DOD had thought complied with the Solomon Amendment. When DOD came to us and said, no, the Third Circuit really hasn't changed matters because we're going to take this to the Supreme Court, and we want law schools really to ignore what the Third Circuit said, DOD and we had some discussions, and we went back to doing it exactly the way DOD wanted to. In the interim...

SESSIONS: Well, let's -- let's -- let's get more basic about it. The military, you stopped complying, and that season was lost before the military realized -- frankly, you never conveyed that to them in a straight-up way like I think you should have. You just started giving them a runaround.

The documents we've gotten from the Department of Defense say that the Air Force and the Army says they were blocked, they were stonewalled, they were getting the runaround from Harvard. By the time they realized that you had actually changed the policy, that recruiting season was over, and the law was never not in force.

I feel like you mishandled that. I'm absolutely confident you did. And -- but you continue to persist with this view that somehow there was a loophole in the statute that Harvard did not have to comply with after Congress had written a statute that would be very hard to get around.

What did the Supreme Court do with your brief? How did they vote on your brief attacking the effectiveness of the Solomon Amendment to assure equal access at Harvard?

KAGAN: Senator Sessions, if -- if I might, you had suggested that the military lost a recruiting season, but, in fact, the veterans organization did a fabulous job of letting all our students know that the military recruiters were going to be at Harvard during that recruiting season, and military recruiting went up that year, not down.

SESSIONS: Well...

KAGAN: Now, you're exactly right that the Supreme Court did reject our amicus brief. Again, we filed an amicus brief not attacking the constitutionality of the Solomon Amendment, but instead saying that essentially the Harvard policy complied with the Solomon Amendment. The Supreme Court rejected it 9-0, unanimously.

SESSIONS: But even before that, the military said the law was still in effect, Harvard had no right to get around it, and they should comply even before the Supreme Court issued a ruling, and they had to contact the university's counsel and the president, Mr. Larry Summers. And they -- Mr. Summers agreed that the military should have full and equal access before even the Supreme Court ruled, but after you had denied equal access. Isn't that right?

KAGAN: Senator Sessions, we had gone back and done exactly what the Department of Defense had asked us to do prior to the time that the Supreme Court ruled. We had done it...

SESSIONS: Wait a minute. You asked them what they asked you to do. After the Third Circuit ruled, you denied them access. They had to insist and demand that they have equal access because the law was still in effect. You did not agree to that. You had reversed that policy.

And the president of the university overruled your decision. According to the internal DOD documents, they say that President Summers agreed to reverse the policy, the dean remains opposed.

KAGAN: Senator Sessions, Larry Summers and I always worked cooperatively on this policy. I didn't ever do anything that he didn't know about, and he never did anything that I didn't approve of.

With respect to the decision that -- that -- that you're talking about, this was a joint decision that Larry and I made that, because DOD thought that what we were doing was inappropriate, we should, in fact, reverse what we had done. You know, that period lasted for a period of a few months in my six-year deanship.

And -- and -- and long before the Supreme Court issued its ruling in the FAIR v. Rumsfeld case, we were doing exactly what DOD asked us to do.

SESSIONS: So it's your testimony that the decision you made immediately after the Third Circuit opinion you concluded was inappropriate, you -- you and President Summers, and you reversed that policy later?

KAGAN: Senator Sessions, what -- what I did after the Third Circuit decision was to say, look, the only appellate court to have considered this question has struck down the statute. We've always thought that our policy was in compliance with the statute.

The appropriate thing for me to do -- really, the obligation that I owed to my school and its longstanding policy -- was to go back to our old accommodation policy, which allowed the military full access, but through the veterans organization.

When DOD came to us and said that it thought that that was insufficient, that it wanted to essentially ignore the Third Circuit decision, because it was taking it up to the Supreme Court, when

they came back to us, we went through a discussion of a couple of months and -- and made a decision to do exactly what DOD wanted.

SESSIONS: Well, you did what DOD wanted when they told the president and the counsel for the university they were going to lose some \$300 million if Dean Kagan's policy was not reversed. Isn't that a fact?

KAGAN: Senator Sessions, we did what DOD asked for because we have always, you know, tried to be in compliance with the Solomon Amendment, thought that we were. When DOD -- DOD had long held that we were. When DOD came back to us and said, no, notwithstanding the Third Circuit decision, we maintain our insistence that you're out of compliance with the Solomon Amendment, we said, OK.

SESSIONS: Well, in fact, you were punishing the military. They protest that you had -- that you spoke to on campus was at the very time in the next building or one or two buildings nearby, the military were meeting there. Some of the military veterans when they met with you the first time expressed concern about an increasingly hostile atmosphere on the campus against the military. Didn't they express that to you?

KAGAN: Senator Sessions, I think, as I said to Senator Leahy, but I tried in every way I could throughout this process to make clear to all our students, not just to the veterans, but to all our students how much I valued their service and what an incredible contribution I thought that they made to the school.

SESSIONS: I don't deny that you value the military. I really don't. And -- but I do believe that the actions you took helped create a climate that was not healthy toward the military on campus.

But let me ask you this. You keep referring in your e-mails and all to the military policy. Isn't it a fact that the policy was not the military policy, but a law passed by the Congress of the United States? Those soldiers may have come back from Iraq or Afghanistan that were appearing to recruit on your campus were simply following the policy of the United States Congress effectuated by law, not their idea, and that you were taking steps to treat them in a second-class way, not give them the same equal access because you deeply opposed that policy.

SESSIONS: Why wouldn't you complain to Congress and not to the dutiful men and women who put their lives on the line for America every day?

KAGAN: Senator Sessions, you're, of course, right that the Solomon Amendment is law passed by Congress. And -- and we never suggested that any members of the military, you know, should be criticized in any way for this.

Quite to the contrary, we -- you know, I tried to make clear in everything I did how much I honored everybody who was associated with the military on the Harvard Law School campus. All that I was trying to do was to ensure that Harvard Law School could also comply with its anti-discrimination policy, a policy that was meant to protect all the students of our campus, including the gay and lesbian students who might very much want to serve in the military, who might very much want to do that most honorable kind of service that a person can do for her country.

SESSIONS: Well, I would think that that's a legitimate concern. And people can disagree about that, and I respect your view on that.

What I'm having difficulty with is why you would take the steps of treating the military in a second-class way, to speak to rallies, to send out e-mails, to immediately, without legal basis -- because the Solomon Amendment was never at any time not in force as a matter of law. Why you would do all those things simply to deny what Congress required, that they had equal access as anyone else?

KAGAN: Senator, the military at all times during my deanship had full and good access. Military recruiting did not go down. Indeed, in a couple of years, including the year that you're particularly referring to, it went up. And it went up because we ensured that students would know that the military recruiters were coming to our campus. Because I talked about how important military service was. Because our veterans organization and the veterans on campus did an absolutely terrific job, a terrific service to their fellow students in talking to them about the honor of military service.

SESSIONS: Well -- I would just say, while my time is -- is running down, I'm just a little taken aback by the tone of your remarks, because it's unconnected to reality.

I know what happened at Harvard. I know you were an outspoken leader against the military policy. I know you acted without legal authority to reverse Harvard's policy and deny those military equal access to campus until you were threatened by the United States government of loss of federal funds. This is what happened.

LEAHY: The senator's time has expired.

(CROSSTALK)

LEAHY: But you can respond to that if you want.

SESSIONS: ... did not happen in that way. And I think if you had any complaint, it should have been made to the United States Congress, not to those men and women who we send in harm's way to serve our nation.

LEAHY: Especially because of the number of people, including the dean of West Point who has praised you and said that you were absolutely not anti-military, I'll let you respond -- take time to respond to what Senator Sessions just said.

KAGAN: Well, thank you, Senator Leahy.

You know, I respect and indeed I revere the military. My father was a veteran. One of the great privileges of my time at Harvard Law School was dealing with all these wonderful students that we had who had served in the military and students who wanted to go to the military.

And I always tried to make sure that I conveyed my honor for the military. And I always tried to make sure that the military had excellent access to our students. And in the short period of time, Senator Sessions, that the military had that access through the veterans organization, military recruiting actually went up.

But I also felt a need to protect our -- to defend our school's very long-standing anti-discrimination policy and to protect the men and women, the students, who were meant to be protected by that policy: the gay and lesbian students who wanted to serve in the military and do that most honorable kind of service. And those are the two things that I tried to do.

And I think, again, the military always had good access at Harvard Law School.

LEAHY: Senator Kohl?

(CROSSTALK)

LEAHY: Senator Kohl?

KOHL: Thank you so much, Senator Leahy.

General Kagan, you will testify this week for many hours regarding your philosophy, your approach to judging, as well as many specific legal issues. And yet one question that I suspect most of the American people are most curious about is the simplest but perhaps the most important one: Why do you want to be a Supreme Court justice?

Anyone in your position would be flattered and highly honored to be nominated to the Supreme Court because it is the pinnacle of the legal profession. But whatever this appointment means to you, what is most important to us is what it will mean for the American people.

So, please tell us, why do you want to serve on the Supreme Court? What issues motivate you the most? And what excites you about the job?

KAGAN: Senator Kohl, it's an opportunity to serve this country in a way that, you know, fits with whatever talents I might have. I believe deeply in the rule of law. The Supreme Court is the guardian of the rule of law. And to be on the Supreme Court and to have that significant and indeed awesome responsibility to safeguard the rule of law for our country is an honor that comes to very few people and is just an opportunity to serve.

And, you know, that's -- that's...

KOHL: I appreciate that very much. But, as we said, it's a tremendous honor, clearly, to serve and to safeguard the rule of law. And I'm sure you feel you're capable of doing that.

But what are the issues that bring you here today? What are the things you feel most passionate about? How are you going to make a difference as a Supreme Court justice from any of the others who might be sitting here instead of you today?

KAGAN: Well, Senator Kohl, I -- I do think that what motivates me primarily is the opportunity to safeguard the rule of law, whatever the issues that might come before the court. And I think that that's the -- the critical thing.

If you don't have a rule of law, if you don't have an independent judiciary that enforces rights, that enforces the law, then no rights are going to be safe or protected. And I think that has to be first and foremost in every judge's mind.

Not -- not in the way a legislator, you know, might care about some particular issue -- "I care about the environment," or, "I care about the economy," or something like that. A judge can't think that way. It's -- it's -- a judge is taking each case that comes before her, and is thinking about how to do justice in that case and is thinking about how to protect the rule of law in that case, how to enforce the law, whether it's the Constitution or a statute.

KOHL: I'm sure that those things are true. But Thurgood Marshall cared passionately about civil rights. Justice Ginsburg had a passion for women's rights. Your father had a passion for tenant's rights.

I'm sure you're a woman of passion. Where are your passions?

KAGAN: Senator Kohl, I think I will take this one case at a time if I'm a judge. And I think I will try to evaluate every case fairly and impartially, try to do justice in that case.

I think it would, you know, not be a right for a judge to come in and say, "Oh, I have a passion for this and that, and so -- so I'm going to, you know, rule in a certain way with regard to that passion."

I'm much more a person who -- I look at an issue before me, a case that might come before me. Try to figure out what's right with respect to that issue, with respect to that case. And if you're a judge, of course, that means trying to figure out what's right under (ph) law.

KOHL: Many Americans following the Supreme Court and our hearings may feel like the Supreme Court is remote and has no impact on their day-to-day lives. So tell us how you are going to help the American people should you be confirmed. How are you going to make a difference in their lives?

KAGAN: Senator Kohl, I think a judge's job is just to decide each case. And it's -- it's hard to say exactly how a judge would make a difference in their lives because you just don't know which cases are going to come before you.

It's not like a legislature where you get to kind of craft an agenda and say, "This year we're going to do the following three things, we're going to work on energy legislation," or, "We're going to work on civil rights legislation." For a judge, it's case by case by case.

KAGAN: That's, I think, the right way for a judge to do a job, is one case at a time, thinking about the case fairly and objectively and impartially. And in -- in the course of doing that, of course, people's lives change, because law has an effect on people. And you hope very much that law improves people's lives and has a beneficial effect on our society. That's the entire purpose of law.

But -- but this -- this isn't a job, I think, where somebody should come in with a particular substantive agenda and try to shape what they do to meet that agenda. It's a job where the principal responsibility is deciding each case, listening to the parties in that case fairly and objectively, and trying to make a good decision on the law.

KOHL: Well, that's true. But it is also true, as you know, that the Supreme Court decides which cases to take up. There are thousands of cases that come before you for you collectively as justices to decide on which ones you will hear. So you're -- you're not just processing cases as they are placed before you. You and the other justices decide which cases you're going -- you're going to judge.

So let me ask you this question: Which ones will motivate you?

KAGAN: Senator Kohl, you're exactly right that the Supreme Court does decide which cases to hear. It's a highly discretionary docket. There are about 8,000 certiorari petitions every year, and only about 80 of them are now taken by the Supreme Court, so maybe 1 in 100.

But there are some pretty settled standards for deciding which cases to take. The first thing, always, is if there's a circuit split, because what the Supreme Court does, one of the principal roles of the Supreme Court is to apply uniformity across our country, so that if one court says X and another court says Y and another says Z with respect to the same issue, the Supreme Court is the one that -- that says we have to take this case so we can just set a clear rule, state what the law is, so that everybody then can follow it across the country. So that's one reason why the court typically grants cert on a case.

Another set of cases where the court very typically often almost always grants certiorari is when a legislature -- excuse me, when -- when another court has invalidated an act of Congress, when a court has said that an act of Congress is unconstitutional.

And there the -- the court almost always says, well, acts of Congress, that's a serious thing to invalidate an act of Congress, you know. For the most part, we want to defer to the legislative branch, to the decisions of our elected branches, so that's such a serious thing, but the court is going to take that case.

And then I suppose that there's a third category of cases, which is just extremely important legal issues, you know, cases where there's not a conflict among the courts of appeals and there's no invalidation of an act of Congress, but the case presents some just strikingly significant legal issue that it's appropriate for the Supreme Court to consider and to issue a decision on. And I think, you know, in each year, there's some number of those cases.

KOHL: General Kagan, as many of us said yesterday, we appreciate the perspective that you would bring to the court as someone who has not been a judge. Senator Feinstein said that's a refreshing quality.

And we appreciate the many thousands of documents that you've made available to us from your work throughout your career, yet they shed little light on your judicial philosophy or how you would analyze and evaluate problems as a judge. That is why these hearings are so important, so that the American people can get a sense of what your judicial philosophy is.

At his confirmation hearings, Justice Alito said, quote, "If you want to know what sort of a justice I will be, look at what sort of a judge that I have been." And other nominees have said similarly.

Since we do not have a judicial record for you, how should we evaluate you so that we do have an idea as to what kind of a justice you will be? What decisions or actions can you point to in your past, in your career, that demonstrate to us what kind of a justice you will be?

KAGAN: Senator Kohl, I think you can look to my whole life for indications of what kind of a judge or justice I would be. I think you can certainly look to my tenure as solicitor general and the way I've tried to approach and handle that responsibility.

I think you can look to my tenure at Harvard Law School and think about the various things I did there and the -- and -- and the approach that I took.

I think you can look to my scholarship, to my speeches, to my talks of various kinds. So I think it -- it -- it may not be quite so easy as what the person -- well, you can say, well, read this body of decisions, but I think I've had very much a life in the law, a very public life in the law.

Senator Schumer referred yesterday to -- to all my scholarship, to all my talks. And I think, you know, you can look to all those things.

I hope what they will show -- and this is for the committee to determine -- but I hope what they will show is a -- a person who is -- who listens to all sides, who is fair, who is temperate, who is -- who has made good and balanced decisions, whether it's as solicitor general or whether it's as dean of Harvard Law School or in any other capacity.

KOHL: Well, I think this is a good time to refer to your 1995 law review article in which you criticized the Supreme Court...

KAGAN: It's been half-an-hour since I heard about that article.

(LAUGHTER)

KOHL: There we are. You said back then, when the Senate ceases to engage nominees in meaningful discussions of legal issues, the confirmation process takes on an air of acuity and farce and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public.

However, more recently, in the meeting that we had, you indicated that you had reconsidered these views, and I think we're getting some indication of that here at the moment. How do you feel about that reconsideration versus what you said back in 1995?

KAGAN: Well, Senator Kohl, I -- I -- I do think that much of what I wrote in 1995 was right, but that I, in some measure, got a bit of the balance off. So what I wrote in 1995 was that the Senate had an important role to play, that the Senate should take that role very seriously, that the Senate should

endeavor to think about what a nominee was -- what kind of justice a nominee would make, and -- and that that was all appropriate.

And I also said that I thought it was appropriate for nominees to be as forthcoming as they possibly could be, and I continue to believe that, and I am endeavoring and will endeavor to do so.

I did think, as I -- as I suggested earlier, that -- that I got the balance a little bit off. I said then, even then in that 1995 article, that it was inappropriate for a nominee to ever give any indication of how she would rule in a case that would come before the court.

And I think, too, it would be inappropriate to do so in a somewhat veiled manner, by essentially grading past cases. But I do think it's very appropriate for you to question me about my judicial philosophy, on the -- the kinds of sources I would look to at interpreting the Constitution or interpreting a statute, about my general approach to judicial decision-making, about the degree to which I would defer or not defer to acts of Congress and -- and -- and to the states.

I mean, all of those things, I think, ought to be a subject of debate.

KOHL: Well, back in that 1995 article, you wrote that one of the most important inquiries for any nominee, as you are here today, is to, quote, "inquire as to the direction in which he or she would move the institution." In what direction would you move the court?

KAGAN: Well, Senator Kohl, I do think that that -- that is the kind of thing that -- all I can say, Senator Kohl, is that I will try to decide each case that comes before me as fairly and objectively as I can. I -- I can't tell you I'll move the court in a particular way on a particular issue, because I just don't know what case...

KOHL: But you said -- you said in 1995, "It is a fair question to ask a nominee in what direction" -- this is your quote -- "would you move the court?"

KAGAN: Well, it might be a fair question.

KOHL: I'm not going to get necessarily a...

(LAUGHTER)

All right, let's move on, comparison to other -- General Kagan, the -- the basic purpose of this hearing is to learn what kind of a person you are and what kind of a justice you will be when you're confirmed. One way we gain insight into your judicial philosophy is to learn which justices you most identify with.

Yesterday, you spoke highly of Justice Stevens and said his qualities are those of a model judge. In addition to Justice Stevens, can you tell us the names of a few current justices or justices of the recent past with whom you most identify in terms of your judicial philosophy and theirs?

KAGAN: Well, I do very much admire Justice Stevens, and I wanted to say so as he left the court because I think he has done this country long and honorable service, that he has been a simply marvelous justice, in his commitment to the rule of law, in his commitment to principle.

That's not to say that Justice Kagan, if I'm so lucky as to ever be called that, Justice Kagan would be Justice Stevens. It's just to say that I have great admiration for the contribution that Justice Stevens has made over many period of years, obviously. But Justice Stevens' contribution to the court is not calculable in years. It's -- it's this extraordinary commitment to the rule of law that was there in his first year and is there in his last.

I think it would be just a bad idea for me to talk about current justices, and I've expressed, you know, admiration for -- for many of them.

KOHL: My, oh, my, oh, my.

(LAUGHTER)

All right, let's move on.

(LAUGHTER)

General Kagan, to help us understand what kind of a justice you would be if you're confirmed, I'd like to briefly describe the philosophies of two justices, ask you which comes more closest to your view.

Justice Scalia considers himself to be an originalist who interprets the Constitution by looking solely at the text. He rejects the notion of a living Constitution and only gives the text of the Constitution, quote, "the meaning that it bore when it was adopted by the people in 1787."

In contrast, Justice Souter has criticized this purely textual approach as having, quote, "only a tenuous connection to reality." He believes that the plain text of the Constitution as written in 1787

does not resolve the conflict in many of today's tough cases. Rather, Justice Souter believes judges must look at the words and seek, quote, "to understand their meaning for living people."

Which view of the constitutional interpretation comes closer to your view and why?

KAGAN: Senator Kohl, I don't really think that this is an either/or choice. I think that there are some circumstances in which looking to the original intent is the determinative thing in a case and other circumstances in which it is likely not to be.

And I think, 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.

The judges always should look to the text. There's no question that if the text simply commands a result -- senators, you know, 30 -- you can only be a senator if you're 30 years old -- then the inquiry has to stop. But there are many, many provisions of the Constitution, of course, in which that's not the case.

When that's not the case, when the text kind -- when the text is subject to one or more interpretations, then often you look to the original intent and you consider that original intent carefully.

An example of that is in the Heller case, the gun case, where actually all nine justices in that ruling looked to the original intent. They had different views of what the original intent was, but all nine of them thought it was important and appropriate to actually think about what the framers had intended when they wrote that language, which of those two meanings, the individual right or the collective right, they had in mind.

But in other cases the original intent is unlikely to solve the question, and that might be because the original intent is unknowable or it might be because we live in a world that's very different from the world in which the framers lived.

In many circumstances precedent is the most important thing. One good example of this is an interpretation of the First Amendment where the court very rarely, actually, says, you know, What did the framers think about this? The framers actually had a much more constricted view of free speech principles than anybody does in the current time. And when you read free speech decisions of the court, they're packed with reference to prior cases, rather than reference to some original history.

So I think it's a little bit case by case by case, provision by provision by provision. And I would look at this very practically and very pragmatically, that sometimes some approach -- one approach is -- will -- will -- is the relevant one and will give you the best answer on the law, and sometimes another.

KOHL: I'd like to talk about antitrust a little bit, General Kagan.

As you know, it's now been 120 years since the passage of the Sherman Act, our nation's landmark antitrust law. For more than a century this measure has protected the principles that we hold most dear -- competition, consumer choice and giving all businesses a fair opportunity to succeed or fail in the free market.

So those of us who are strong believers in our free market capitalistic economic system should also support antitrust law, I believe.

In the words of the Supreme Court in 1972, antitrust law is a, quote, "comprehensive charter of economic liberty."

Recently, however, we've seen many industries become increasingly concentrated and consumers having fewer choices. In the last few years, we've seen a series of antitrust cases at the Supreme Court in which the Supreme Court majority has sided with the defendant and as a result made it more difficult for consumers and competitors to bring their antitrust cases.

Many are concerned that the cumulative effect of these cases has harmed consumers because they are the ones who will suffer by paying the high prices that result from unchallenged anti-competitive practices.

These cases include the Leegin, Twombly and Trinko cases, among others.

Do you share this concern? Should we be worried that as a result of these cases we've reached a tipping point where the antitrust laws may not be protecting consumers as much as they were intended to do?

KAGAN: Senator Kohl, I know that several of those cases you mentioned are ones in which there is considerable debate. The Leegin case is a good example.

The Leegin case is one in which the court overturned a very long-term precedent, many, many decades' precedent, maybe 100 years, the Dr. Miles precedent. And the courts did so really on the basis of new economic theory, new economic understandings.

But there is some question, to be sure, as to how new economic understandings ought to be incorporated into antitrust law. There the question was how one should look at vertical agreements rather than horizontal agreements, agreements between a manufacturer and a distributor, and the question of whether those agreements are per se uncompetitive or whether they should be subject to more of a rule of reason analysis.

And I believe the court had held that they were per se uncompetitive -- noncompetitive -- and -- and -- and per se violative of the antitrust laws, and changed that to a rule of reason analysis.

I think on the one hand it's clear that antitrust law needs to take account of economic theory and economic understandings, but needs to do so in a -- in a careful way and to make sure that it does so in a way that is consistent with the purposes of the antitrust laws, which is to ensure competition, which is, as you say, to be a real charter of economic liberty.

KOHL: Well, let's talk about the Leegin case. It was a 5-4 decision in which the Supreme Court in 2007 overturned what you correctly referred to as a 96-year-old precedent and held that a manufacturer setting retail prices no longer automatically violated antitrust law.

This means as a practical matter a manufacturer is now free to set minimum retail prices for his products and prohibit discounting.

What do you think of this decision? Do you think it was appropriate for the Supreme Court by judicial fiat to overturn a nearly century-old decision on the meaning of the Sherman Act that businesses and consumers had come to rely on and which had never been altered by Congress?

KAGAN: Senator Kohl, I think that that decision does present the question that we just talked about, which is, you know, how sort of new economic theory ought to be incorporated into antitrust law. And especially to the extent that the court has already ruled on a case, to the extent that the court already has settled precedent in the area, it does raise the question of what it takes to reverse a precedent, a question on which there is a large body of law.

I'm not going to grade the Leegin decision, but -- but -- but I do recognize very much the concern that some have said about it, which -- which is this -- this -- this question of when you have precedent in the area, when the antitrust laws have been interpreted in one way over time, and new economic understandings, new economic theory might suggest a different approach, how one balances those two things.

KAGAN: And I think that that's a very important question for the court going forward.

KOHL: General Kagan, how do you feel about permitting cameras in the Supreme Court for oral arguments?

KAGAN: Senator Kohl, this is actually something that I -- I spoke about when I was -- as solicitor general before I was ever nominated to this court. So I have expressed a view on this question. And I -- I recognize that some members of the court have a different view. And certainly when and if I get to the court I will talk with them about that question.

But I have said that I think it would be a terrific thing to have cameras in the courtroom. And -- and the reason I think is as -- when you see what happens there, it's an inspiring sight. I guess I talked about this a little bit in my opening statement yesterday.

I basically attend every Supreme Court argument. Once a month I argue before the court. When I'm not arguing, I'm sitting in the front row watching one -- some member of my office or somebody else argue. And it's an incredible sight. Because all of these -- all nine justices, they're so prepared, they're so smart, they're so thorough, they're so engaged. The questioning is rapid fire. You're really seeing an institution of government at work, I think, in a really admirable way.

So I think -- and, of course, the issues are important ones. I mean, not -- some of them will put you to sleep, you know.

(LAUGHTER)

But -- but a lot of them, the American people should be really concerned about and should be interested in. And so I think it would be a great thing for the institution, and more important I think it would be a great thing for the American people.

Having said that, I mean, I have to say, I understand that some of the current justices have different views, have different -- have concerns about it. Maybe that they think it would actually change the way the Supreme Court arguments do work. And I would, you know, very much want to talk with them about those views.

And, you know, on -- on almost every issue I'm open to being persuaded that I'm wrong. But on this one, I -- I have expressed a real view, and it's the one I hold, is that it would be a great thing for the court and it would be a great thing for the American people.

KOHL: All right, General Kagan, we all understand that you may be reluctant to comment on cases that will or are likely to come before you. I'd like to ask you a question about a case that the Supreme Court will certainly never see again, the 2000 presidential election contest between President Bush and Vice President Gore.

Many commentators see the Bush v. Gore decision as an example of judicial improperly injecting itself into a political dispute. What is your view of that, of the Bush v. Gore decision? And was the Supreme Court right to have gotten involved in the first place, General Kagan?

KAGAN: Senator Kohl, I think I might disagree that it's the kind of decision that will never come before the court again. Of course, you're right that it will never come before the court again. But the question of when the court should get involved in election contests and disputed elections is -- is, I think, one of some magnitude that might well come before the court again.

And if it did, you know, I would try to consider it in an appropriate way -- and, you know, reading the briefs and listening to the arguments and talking with my colleagues. I think it is an important -- an important question, and a difficult question, about how an election contest that -- that -- that at least, arguably, the political branches can't find a way to resolve themselves, what should happen, and whether and when the court should get involved. It's -- it's hard to think of a more important question in a democratic system, and -- and maybe a tougher one.

KOHL: Do you believe, when these hearings are over this week, the American people should have a pretty good idea of what your judicial philosophy is?

KAGAN: I hope that they will, Senator Kohl. And -- and as we go around the room and people talk to me about the way in which I would decide cases, the approach I would use, just the way you asked me, about, you know, would I just look to the original intent or would I look to a broad variety of sources, and when and where, I hope that the American people will get a sense of how I would approach cases.

KOHL: Thank you.

LEAHY: So if people (inaudible) mentioned to some of the senators up here -- wanting to yield to Senator Hatch for his round and Senator Feinstein for her round, but then take a 10-minute break. We're trying to -- it just works right to break for lunch around 1:00.

We have a vote -- and I'm double-checking to make sure whether it is set for 2:15. If that's the case, we would vote at -- several of us would vote at the desk and come back immediately so that we could start about 2:20, after lunch. But after these two senators ask their questions, we'll break for 10 minutes.

Senator Hatch?

HATCH: Well, thank you, Mr. Chairman.

You're doing well. Relax as much as you can.

I'm going to ask a series of questions, some of which you -- just ask for yes or no. To the extent that you can do that, I'd appreciate it. But, you know, you -- you can do whatever you want to do. How's that?

General Kagan, I want to begin by discussing freedom of speech in general, and campaign finance reform in particular.

As you know, the first word in the First Amendment is "Congress." I know that the Supreme Court has said that the First Amendment also limits state government, but do you agree that the -- that America's founders were first concerned about setting explicit limits on the federal government in areas such as freedom of speech?

KAGAN: There's no question that the First Amendment limits what Congress and what other state actors, executive officials, can do.

HATCH: OK. The Supreme Court has said that the First Amendment protects some types of speech more strongly than others, and even that it does not protect some types of speech at all.

Do you agree that the Supreme Court has held repeatedly that political speech, especially during a campaign for political office, is at the core of the First Amendment and has the First Amendment's strongest protection?

KAGAN: Political speech is at the core of the First Amendment. I think that that has been said many times by the court.

HATCH: Yes, I think one of the great examples, *EU v. San Francisco County Democratic Central Committee* back in 1989, really came out very strongly on that.

When you worked in the Clinton White House, you wrote a memo in October 1996 in which you wrote this, quote: "It is unfortunately true that almost any meaningful campaign finance reform proposal raises constitutional issues. This is a result of the Supreme Court's view -- which I believe to be mistaken in many cases -- that money is speech, and that attempts to limit the influence of money in our political system therefore raise First Amendment problems," unquote.

Now as I understand it, President Harry Truman argued as far back as 1947 that a ban on independent expenditures would, quote -- a, quote, "dangerous intrusion on free speech," unquote.

The notion that spending and speech are necessarily related is hardly new and hardly confined to the Supreme Court or even one political party. Do you -- do you recognize -- excuse me -- do you reject the idea that spending is speech?

KAGAN: Senator Hatch, those -- the quote that you read, I believe, was not written by me in my voice. It was a set of talking points that I prepared for -- I'm not sure if it was for the president, for President Clinton, or if it was for the press office. But it was meant to reflect the administration's position at the time.

The administration was trying very hard to enact the McCain-Feingold bill. And those talking points were in service of that objective, and so they weren't, you know, my personal constitutional or legal views, or anything like that, but was just a set of talking points that I prepared for -- I think it was for the press office. It might have been for the president himself.

HATCH: Well, you were listed as the creator.

KAGAN: I created a lot of talking points in my time.

(LAUGHTER)

HATCH: OK. OK, I accept that.

I want to turn to the Supreme Court's decision in *Citizens United v. FEC* for a little bit.

I've seen media reports that in a meeting with at least one of your colleagues on this committee, you said that you believed the *Citizens United* case was wrongly decided. Is that true?

KAGAN: Senator Hatch, I argued the case, of course. I walked up to the podium and I argued strenuously that the bill was constitutional. At least for me when I prepare a case for argument, the first person I convince is myself.

Sometimes I'm the last person I convince, but the first person I convince is myself. And so, you know, I did believe that we had a strong case to make. I tried to make it to the best of my ability.

HATCH: OK. The statute being challenged in this case prohibited different types of for-profit corporations, nonprofit corporations and labor unions from using their regular budget to fund speech by candidates on election issues within 30 to 60 days of a primary or a general election.

They could form separate organizations called PACs, political action committees, to do so, but they did not have the freedom to use their own money directly to speak about candidates or issues as they saw fit. Now, I know there is a lot of loose rhetoric about the decision in this case allowing unlimited, quote, "spending on elections," unquote.

I assume that is to conjure up images of campaign contributions or collusion. But just to clarify the facts, the statute and the *Citizens United* case involved what are called "independent expenditures" or money spent by corporations, nonprofit groups or unions completely on their own to express their political opinions. This case had nothing to do with contributions to campaigns or spending that is coordinated or connected in any way with candidates or campaigns.

Isn't that true?

KAGAN: You're right, Senator Hatch, that this was an independent expenditure case rather than a contributions case.

HATCH: Right. When President Obama announced your nomination, he said you believed that, quote, "in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens," unquote. Virtually all of the rhetoric surrounding this case is focused on large for-profit corporations, but the law in question and, of course, this case affected much more than that. As you know, in that case, a nonprofit organization sued to defend its freedom of speech rights.

Do you agree that many people join or contribute to nonprofit advocacy organizations because they support the positions and message of those groups and because those groups magnify the voice of their members and their contributors?

KAGAN: I do agree that civic organizations are very important in our society, Senator.

HATCH: These are not just civic organizations. I'm talking about unions and businesses and nonprofits and profits and partnerships and S corporations and a lot of others.

KAGAN: Yes, you're right that the statute that the government defended in the Citizens United case was a statute that applied to many different kinds of corporations.

HATCH: That's right.

KAGAN: One of the things that the government suggested to the court in the course of its arguments was that one possibly appropriate way to think about the case might be to treat those different situations differently. But the statute itself applied to many different kinds of organizations.

HATCH: OK. Now, President Obama called the Citizens United decision, quote, "a victory for powerful interests that marshal their power every day in Washington to drown out the voices of every day Americans," unquote. Now, as I said, the statute applied to for-profit corporations, nonprofit corporations and labor unions.

Do you believe that, let's just take unions, do you believe that they are, quote, "powerful interests that drown out the voices of every day Americans"?

KAGAN: Senator Hatch, what the -- what the government tried to argue in that case was that Congress had compiled a very extensive record about the effects of these independent expenditures by corporations generally and by unions generally on the political process. And that what the Congress had found was that these corporations and unions had a kind of access to congressmen, had a kind of influence over congressmen that changed outcomes, that was a corrupting influence on Congress.

And that was what the many, many, many thousand-page record that was created before Congress enacted the McCain-Feingold bill revealed, and that's what we tried to argue to the court.

HATCH: I understand the argument, but the statute banning political speech that was challenged in Citizens United also applied to small S chapter corporations that might have only one shareholder. There are more than 4.5 million S corporations or S chapter corporations in America. We have 56,000 in my home state of Utah alone. These are small companies who want the legal protections that incorporating provides. These are family farmers, ranchers, mom-and-pop stores and other small businesses.

Before the Citizens United decision, these small family businesses could be barred from using their regular budget for, say, a radio program or even a pamphlet opposing their congressman for his vote on a bill if it was that close to an election.

Do you believe the Constitution gives the federal government this much power?

KAGAN: Senator Hatch, Congress determines that corporations and trade unions generally had this kind of corrupting impact on...

HATCH: I'm talking about all of these 4.5 million S -- small corporations as well.

KAGAN: Senator Hatch, of course, in the solicitor general's office, we defend statutes and Congress determined...

HATCH: No, no. I understand that.

(CROSSTALK)

HATCH: Let me ask my questions the way I want to.

(CROSSTALK)

HATCH: I will. I'm going to be fair. I intend to be, and you know that after 34 years.

(LAUGHTER)

Go ahead, I -- did you have something else you want to add?

KAGAN: No, go ahead.

HATCH: We have to have a little back-and-forth every once in a while or this place would be boring as hell, I tell you.

(LAUGHTER)

KAGAN: And its gets the spotlight off me, you know, so I'm -- I'm all for it. Go right ahead.

HATCH: I can see that. And by the way, I've been informed that hell is not boring, so you can imagine what I mean by that.

KAGAN: Just hot.

HATCH: OK. I have the current volume -- the current volume of the Code of Federal Regulations. This is governing federal campaign finance. It's 568 pages long, this -- this code. This does not include another 1,278 pages of explanations and justifications for these regulations, nor does it include another 1,771 Federal Election Commission advisory opinions, even more enforcement rulings, and still more federal statutes.

Now, let me ask you this: Do you believe that the Constitution allows the federal government to require groups such as nonprofit corporations and small S chapter corporations to comb through all of this? This is just part of it. There are thousands of other pages of regulations -- likely hire an election law attorney and jump through all the hoops of forming a political action committee, with all of its costs and limitations, simply to express an opinion in a pamphlet or in a radio or a movie, or just to criticize their elected officials. Do you really believe the Constitution allows that type of requirement?

KAGAN: Well, Senator Hatch -- I want to say Senator Hatch, you should be talking to Senator Feingold, but I won't do that.

Senator Hatch, Congress -- Congress made a determination here, and the determination was that corporations and unions generally had this kind of corrupting influence on Congress when they engaged in...

(CROSSTALK)

HATCH: Would you acknowledge that there are all these other smaller groups and all these other groups that have -- should have a right to speak as well?

KAGAN: The solicitor general's office, of course, defends statutes as they're written, and Congress made the determination broadly that corporations and trade unions had this corrupting influence on Congress and -- and in the solicitor general's office, we in the solicitor general's office, as other solicitor generals' offices have done, vigorously defended that statute as it was written...

HATCH: I understand.

KAGAN: ... on the basis of the record that was made in Congress, this, I think it was an 100,000-page record about the corrupting influence of independent expenditures made by corporations and unions. Now, the court rejected that position. The court rejected that position in part because of what you started with. You said political speech is a paramount First Amendment value, which is no doubt the case. And the court applied a "compelling interest" standard and the court rejected the position.

But -- but the position that we took was to defend the statute which applied broadly.

HATCH: No, I agree -- I have no problem with that because that was your job. But I'm getting into some of the comments by some of our colleagues, by the president and others, about how wrong this case was when I don't think it was wrong at all. Your 1996 law review article about private speech and public purpose emphasized the need to examine the motive behind speech restrictions.

Since you've already written about this, I would like to know whether you personally agree with the Supreme Court in the Citizens United decision that, quote, "speech restrictions based on the identity of one speaker are all too often simply a means to control content," unquote. Do you agree with that?

KAGAN: Senator Hatch, speaker-based restrictions do usually get strict scrutiny from the Supreme Court and for the reason that you suggest, which is a concern about why it is that Congress is -- is saying one speaker can speak and not another.

KAGAN: I had a very interesting colloquy with Justice Scalia at the court on this question.

HATCH: I understand.

KAGAN: Justice Scalia said to me, and it's a -- it's a powerful argument. He said well, you know, if you let Congress think about these things, Congress is going to protect incumbents, that that might

be a reason for Congress to say that certain groups can make independent expenditures and others not.

HATCH: Well, one part of Congress would protect the incumbents. The others would be trying to throw them out. I mean, that's what...

(LAUGHTER)

That's what this system is.

KAGAN: But I said to Justice Scalia, and I think it's true, with respect to the McCain-Feingold bill, that all the empirical evidence actually suggests -- I think my line was, this is the most self-denying thing that Congress has ever done.

Because all the empirical evidence suggests that these corporate and union expenditures actually do protect, and notwithstanding that, in the McCain-Feingold bill, Congress determined that it was necessary in order to prevent corruption to prevent those expenditures. But, you know, the court said no.

HATCH: Well, tell that to Blanche Lincoln...

(LAUGHTER)

... how incumbents are protected. In this case, the speech in which Citizens United -- I think about Blanche Lincoln, one of the nicer people around here, who had \$10 million spent against her by the unions just because they disagreed with her on one or two votes.

I mean, you know -- and let me -- let me keep going now. In this -- and I'm enjoying our colloquy together.

KAGAN: Me, too.

HATCH: In this -- I hope so. In this case, the speech in which Citizens United wanted to engage was in the form of a movie about a presidential candidate, Hillary Clinton, at the time.

The deputy solicitor general first argued the case, the deputy solicitor general from your office. He told several justices that, if a corporation of any size, a union or even a nonprofit group did not have a separate PAC, the Constitution allows Congress to ban publishing, advertising or selling not only a traditional print book that criticized a political candidate but an electronic book available on devices such as the Kindle, even a 500-page book that had only a single mention of a candidate -- not only print or electronic books but also a newsletter, even a sign held up in Lafayette Park.

Now, isn't that what, under that argument at that time, your office admitted that, at first oral argument, at the end of the day, the Constitution allows Congress to ban them from engaging in any political speech in any of those forums?

KAGAN: Senator Hatch...

HATCH: I'm not blaming you for the priority, but nor am I really blaming the person who was trying to defend this statute. I'm just saying that's what happened.

KAGAN: Senator Hatch, the statute which applies only to corporations and unions when they make independent expenditures, not to their PACs...

(CROSSTALK)

KAGAN: But corporations and unions, when they make independent expenditures within a certain period of a -- of an election...

HATCH: Right.

KAGAN: ... the statute does not distinguish between movies and anything else.

HATCH: Well, as you can see, I'm finding a certain amount of fault with that. And that's why the Citizens United case, I think, is a correct decision.

The court's been criticized, including just yesterday in this hearing, for not deciding the Citizens United case on narrower statutory grounds.

But according to some media accounts, such as in National Journal, it was your office's admission that the statute had much broader constitutional implications that prompted the court to ask for a second argument in this case. Now, that's where you come in. You reargued the case last September, and I believe that it was Justice Ginsburg who asked whether you still believed that the federal government may ban publication of certain books at certain times.

You said that the statute in question covered books, but that there might be some legal arguments against actually applying it to books. I certainly agree with you on that.

But didn't you argue that the Constitution allows the federal government to ban corporations, union and nonprofit groups from using their regular budget funds to publish pamphlets that say certain things about candidates close to an election? You did...

KAGAN: Senator Hatch, we were -- of course I was defending the statute as it was written.

HATCH: And I understand.

KAGAN: And the statute as it was written applies to pamphlets as well as to the movie in the case, and we made a vigorous argument that the application of that statute to any kind of classic electioneering materials, not books, because they aren't typically used to electioneer, but that the application of the statutes to any kinds of classic electioneering materials was in fact constitutional and that the court should defer to Congress's view of the need for this...

HATCH: I accept that. I accept that you made that argument and that you were arguing for statutory enactment by this -- by the Congress. But as I mentioned, you said that the federal government could ban certain pamphlets at certain times because pamphlets are, as you put it, quote, "pretty classic electioneering," unquote.

You said that pamphleteering is "classic political activity with deep historical roots in America." Certainly some of the most influential pieces of political speech in our nation's history have been pamphlets such as Thomas Paine's "Common Sense." Since, in the Citizens United case, you were defending application of the statute to a film, would you also consider films as classic electioneering?

KAGAN: Senator Hatch, I'm trying to remember what our -- what our brief said, but yes, I think that the way we argued the case...

HATCH: You took that position?

KAGAN: ... it applies to films, as well, of course.

HATCH: All right. A pamphlet is often defined, at least in the dictionary, as an unbound printed work, usually with a paper cover or a short essay or treatise.

In another first amendment context involving the establishment clause, Justice Kennedy criticized the idea that application of the first amendment depended on such things as the presence of a plastic reindeer or the relative placement of a poinsettia.

I believe he called that a "jurisprudence of minutia." I thought it was an interesting comment, myself.

Do you believe that the protection of the first amendment should depend on such things as the stiffness of a cover, the presence of a binder or the number of words on a page?

Now you can give an opinion on that since that case is decided.

KAGAN: Senator Hatch, what we did in the Citizens United case was to defend the statute as it was written, which applied to all electioneering materials, with the single exception of books, which we told the court were not the kind of classic electioneering materials that posed the concerns that Congress had found to be posed by all electioneering materials of a kind of classic kind. Books are different. Books -- you know, nobody uses books in order to campaign.

(CROSSTALK)

KAGAN: But with respect...

HATCH: That's not true. And you did say the books are probably covered, but you didn't think they would...

KAGAN: I thought -- I said that we -- the argument was that they were covered by the language of the statute but that a good constitutional challenge, as-applied constitutional challenge, could be made to it because the purposes that Congress had in enacting the statute, which were purposes of preventing corruption, would not easily have -- have -- have applied to books but would have applied to all the materials that people typically use in campaigns.

HATCH: I understand. In 1998, when you served in the Clinton administration, the Federal Election Commission sued Steve Forbes and his company that publishes Forbes magazine. Now, I have a copy of the Forbes magazine right here, and I think most people are familiar with it.

Steve Forbes had taken a leave from his position with the company to run for president but continued writing columns on various issues. The FEC used the same statute that you defended in the Citizens United case to say that these columns were illegal corporate contributions to Forbes's presidential campaign.

And I know that the FEC later decided to terminate the lawsuit. And I know that this Forbes lawsuit involved alleged campaign contributions rather than independent expenditures, but the same statute was involved.

And I use this as an example to show what can happen on the slippery slope of the federal government regulating who may say what and when about the government.

Now, the Forbes case involved a magazine. The case you argued involved a movie. Your office admitted that the statute could apply to books and newsletters. You admitted that it could apply to pamphlets.

Now, all of this involves the political speech that is the very heart of the first amendment, whether engaged in by for-profit corporations, nonprofit corporations, tiny S Chapter corporations or labor unions.

Do you really believe -- now, this is your personal belief -- do you really believe -- I understand you represented the government, but do you really believe that the Constitution allows the federal government this much power to pick and choose who may say what, how and when about the government?

KAGAN: Senator Hatch, putting the Citizens United case to the side, I think that there are extremely important constitutional principles that prevent the government from picking and choosing among speakers except in highly unusual circumstances with hugely compelling interests.

HATCH: Well, what's highly unusual about a book...

KAGAN: Well...

HATCH: ... or a pamphlet or a movie?

KAGAN: Senator Hatch, I said putting Citizens United to the side. I argued that case, I argued it on behalf of the government because Congress had passed a statute. We argued...

HATCH: But you do believe it was wrongly decided, too, don't you?

KAGAN: I'm sorry?

HATCH: You did take the position it was wrongly decided?

KAGAN: I -- I -- I absolutely said, Senator Hatch, that when I stepped up to the podium as an advocate, I thought that the U.S. government should prevail in that case and that the statute should be upheld.

HATCH: OK. OK.

KAGAN: I want to make a clear distinction between my views as an advocate and any views that I might have as a judge. I do think Citizens United is settled law going forward. There's no question that it's precedent, that it's entitled to all the weight that precedent usually gets.

I also want to make clear that in any of my cases as an advocate, and this is Citizens United or any of the other cases in which I've argued, you know, I'm approaching the things -- the cases as an advocate from a perspective of...

HATCH: OK.

KAGAN: ... first the United States government interests. And also it's a different kind of preparation process. You don't look at both sides in the way you do as a judge.

HATCH: I got that. I got that. I don't have any problem with that.

All I'm saying is, is that we've had arguments right here in this committee that this was a terrible case that upset 70 years of precedent, and I've heard all these arguments. And they're -- they're just inaccurate. That's what we're establishing here.

When President Obama criticized the Citizens United decision in the State of the Union address with the Supreme Court justices sitting there, he said that it would allow foreign corporations to fund American elections. Others have said the same thing.

Do you agree that this case involved an American nonprofit organization, not a foreign corporation; that this case involved independent political speech, not campaign contributions; and that the separate laws regarding political spending by foreign corporations and campaign contributions by anyone are still in force today?

KAGAN: Senator Hatch, this case did, as you say, these parties were -- were domestic, nonprofit -- was a domestic nonprofit corporation.

HATCH: OK. Yes, well, there was no foreign corporation involved. That's one of the points I'm trying to establish. And it was a misstatement of the law.

I'm not here to beat up on President Obama, I just want to make this point. And yet colleagues have just accepted that like that's true. It isn't true.

In *First National Bank of Boston v. Bellotti*, the Supreme Court held in 1978, more than 30 years ago, that, quote, "The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate and the dissemination of information and ideas that the First Amendment seeks to foster," unquote.

Bellotti was decided just two years after the landmark case of *Buckley v. Valeo*. In *Bellotti* the court recognized that corporations have a First Amendment right to engage in political speech.

In that decision, Chief Justice Burger wrote an interesting concurrence in order to, as he put it, quote, "raise some questions likely to arise in the future," unquote. These questions included that large corporations would have an unfair advantage in the political process. He had some amazing insight there, I think, because some people -- because people are making just such arguments today.

That case also involved the First Amendment protection of the press, but Burger noted how the government historically has tried to limit what may be said about it. He concluded, quote, "In short, the First Amendment does not belong to any definable category or persons or entities. It belongs to all who exercise its freedoms," unquote.

Do you agree with that?

KAGAN: I'm sorry, Senator Hatch. The...

HATCH: Do you agree with Justice Burger's comment there?

KAGAN: Would you read that again? I'm sorry.

HATCH: Sure. I'd be glad to.

He said, "In short the First Amendment does not belong to any definable category or persons or entities. It belongs to all who exercise its freedoms."

KAGAN: Senator Hatch, it's -- the First Amendment protects all of us and grants all of us rights.

HATCH: Right. And they're important rights.

In *Citizens United* -- see, I'm getting a little tired of people on the left saying it was a terrible case, it was wrongly decided, when, frankly, let me make this point, in *Citizens United* the court listed at least 25 precedents dating back almost 75 years -- here's a list of them right here -- holding generally that the First Amendment protects corporate speech and specifically that it protects corporate political speech.

Now, I'd like to put these cases in the record at this point.

LEAHY: Without objection.

HATCH: On the other side of the precedential scale is a single 1990s decision in *Austin v. Michigan Chamber of Commerce*. As the court said in *Citizens United*, no other case had held that Congress may prohibit independent expenditures for political -- for political speech based on the identity of the speaker.

In other words, *Austin* was the aberration, the exception, the break in the court's consistent pattern of precedents. And many folks have -- and, Mr. Chairman, I'm going to need about 30 seconds more, just to finish here.

(CROSSTALK)

LEAHY: Thirty seconds more.

HATCH: OK.

Many folks have attacked the decision, saying it is a prime example of, quote, "conservative judicial activism," unquote, because it ignored precedent by overruling *Austin*.

But by overruling that one precedent, wasn't the court really reaffirming a much larger group of previous decisions, including *Bellotti*, that, as we discussed, affirmed that corporations have a First Amendment right to engage in political speech? And that includes all these small corporations. That sounds like the court is committed to precedent, not rejecting it.

Now, I thank my -- I thank my chairman for allowing me to make that last comment, but I get a little tired of people misstating what *Citizens United* is all about...

KAGAN: Senator Hatch, I think...

(CROSSTALK)

HATCH: And I've appreciated your comments here today.

KAGAN: Senator Hatch, I think that there was a significant issue in the case...

HATCH: Yes?

KAGAN: ... about whether Austin was an anomaly, as you quoted, or whether it was consistent with prior precedent and -- and -- and consistent with subsequent precedent as well. And certainly the government argued strenuously that Austin was not an anomaly, although the court disagreed and held that it was.

(CROSSTALK)

LEAHY: Senator Feinstein is recognized. And then, after that round of questioning, we'll take a short break.

Senator Feinstein?

FEINSTEIN: Thank you very much, Mr. Chairman.

I just want to clear up one thing before I go on. It's my understanding that you specifically told the Supreme Court that books have never been banned under federal campaign finance laws and likely could not be. And I believe -- here's a quote: "Nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem." Is that not correct?

KAGAN: Yes, that's exactly right, Senator Feinstein.

FEINSTEIN: So that it's clear to me that the campaign finance laws invalidated by the Supreme Court in Citizens United were intended to prevent corporations from spending limitless dollars to elect candidates to do their bidding, not to prevent authors from publishing their books?

KAGAN: We said that the act ought not to be applied. It had never been applied to books. We thought it never would be applied to books. And to the extent that anybody ever tried to apply it to books, what I argued in the court was that there would be a good constitutional challenge to that because the corrupting potential of books is different from the corrupting potential of the more typical kinds of independent expenditures.

FEINSTEIN: Thank you very much.

Now, I want to just have a little heart-to-heart talk with you, if I might. I come at the subject...

KAGAN: Just you and me?

FEINSTEIN: Just you and me and nobody else.

(LAUGHTER)

LEAHY: Don't anybody in the room listen.

(LAUGHTER)

FEINSTEIN: I come at the subject of guns probably differently than most of my colleagues. I think I've seen too much.

You know, I wrote the assault weapons legislation. I found the body of Harvey Milk. I became mayor as a product of assassination.

I've watched as innocent after innocent has been killed, the latest of which in my state is two weeks ago, a 6-year-old in a Spider-Man costume, eating an ice cream bar in the kitchen, was killed by a bullet coming through the room.

I can show you in Los Angeles where a woman ironing, killed the same way. A youngster playing the piano, killed the same way, bullet right through the walls, is paraplegic today.

Now, you answered Senator Leahy's question that you believe that both Heller and McDonald are binding precedent and entitled to all respect to binding precedent in any case.

FEINSTEIN: "That is settled law," you said.

OK. This is a 5-4 closely decided decision in both cases. California is not Vermont. California's a big state with roiling cities. It's the gang capital of America. The state has tried to legislate in the arena.

As I understand McDonald, it's going to subject virtually every law that a state passes in this regard to a legal test. And that causes me concern, because states are different. Rural states have different problems than large metropolitan states do.

I mean, we probably have as many as 30 million people living in cities where the issue of gangs is a huge question.

So here's my question to you: Why is a 5-4 decision -- in two quick cases, why does it throw out literally decades of precedent in the Heller case in your mind? Why does it -- why do these two cases become settled law?

KAGAN: Senator Feinstein, because the court decided them as they did. And once the court has decided a case, it is binding precedent.

Now there are various reasons for why you might overturn a precedent. If the precedent has proved -- proves unworkable over time or if the doctrinal foundations of the precedent are eroded, or if the factual circumstances that are -- were critical to why the precedent -- to the original decision, if those change.

But -- but unless one can sort of point to one of those reasons for reversing a precedent, the operating presumption of our legal system is that a judge respects precedent. And I think that that's an enormously important principle of the legal system, that -- that one defers to prior justices or prior judges who have decided something. And -- and that it's not enough, even if you think something is wrong, to say, "Oh, well that decision was wrong. They got it wrong."

That the whole idea of precedent is -- is that's not enough to say that a precedent is wrong. You just -- you assume that it's -- that it's right and that it's valid going forward.

FEINSTEIN: OK. Let's go to the 1973 case of Roe v. Wade, the 1992 case of Planned Parenthood v. Casey, the 2000 case of Stenberg v. Carhart.

In those cases, the Supreme Court clearly stated, and I quote, "Subject to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate and even prescribe abortion except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother." That's 30 years of case law.

But in the 2007 case of Carhart v. Gonzales, the court issued a 5-4 decision upholding a statute that did not contain an exception to protect the health of the mother for the first time since Roe was passed in 1973.

So let me ask you clearly, in a memo that you wrote in 1997, you advised President Clinton to support two amendments to a late stage abortion bill to ensure that the health of the mother would be protected.

Here's the question: Do you believe the Constitution requires that the health of the mother be protected in any statute restricting access to abortion?

KAGAN: Senator Feinstein, I do think that the continuing holding of Roe and Doe v. Bolton is that women's life and women's health have to be protected within -- in abortion regulation.

Now, the Gonzales case said that with respect to a particular procedure there was -- that the -- that the statute Congress passed, which passed a statute without a health exception and with only a life exception, was appropriate because of the large degree of medical uncertainty involved.

FEINSTEIN: Because of the procedure?

KAGAN: Because of the procedure.

But with respect to abortion generally, putting that procedure aside, I think that the continuing holdings of the court are that the woman's life and that the woman's health must be protected in any abortion regulation.

FEINSTEIN: Thank you very much.

Let me move on to executive power, if I might. Some on the left have criticized your views on executive power, finding fault with your testimony during your 2009 confirmation hearing as solicitor general, in which you agreed with Senator Lindsey Graham that the law of armed conflict provides sufficient legal authority for the president to detain individuals suspected of terrorist ties without trial.

You also agreed that the courts have a role in determining whether a particular detention is lawful, and that substantive due process is required before an individual may be detained.

You agreed during the aforementioned hearing that an individual suspected of financing Al Qaida in the Philippines was, quote, "part of the battlefield," end quote, for the purpose of capture and detention.

Could you elaborate on the scope of the president's authority to detain individuals under the law of armed conflict?

KAGAN: Senator Feinstein, the conversation Senator Graham and I had -- and I believe in that same hearing you asked a similar question -- starts with the Hamdi case, where the Supreme Court said that the AUMF, the Authorization for the Use of Military Force, which is the statute that applies to our conflict with Iraq and Afghanistan, that the AUMF includes detention authority.

Detention -- and Hamdi said that the law of war typically grants such authority in a wartime situation, and interpreted the AUMF consistent with that law of war understanding.

Now, the question of exactly what the scope of that detention authority is has been and continues to be the subject of a number of cases. And in the role of solicitor general, I've participated in some of those issues.

The Obama administration has a definition of enemy belligerence that -- that it believes are subject to detention under the AUMF and as approved by Hamdi. And the Solicitor General's Office has used that definition of an enemy belligerent, which is a person who is part of or substantially supports the Al Qaida and Taliban force. That's the definition that the Solicitor General's Office has -- has advocated, as has the rest of the Justice Department.

Now, there are a number of uncertain questions in this area that almost surely will come before the Supreme Court, questions about whether the scope of the definition that the Obama administration has been using is appropriate, whether it's too broad, whether it's too narrow; where the battlefield is; what counts as -- do you have to be a member of a fighting force or is it sufficient that you support the fighting force; and if so, what kind of support might give rise to detention?

So all of those questions are, I think, questions that might come before the court in the future. The Obama administration has taken views as to some of them, not all of them, in cases that have been litigated over the past couple of years. But there is certainly quite a number of questions that will come before the court about the exact scope of detention authority.

FEINSTEIN: So if I understand you correctly, you would say that the executive's power in this area is really limited by the specifics of the actual situation -- if I understand what you're saying?

KAGAN: Senator Feinstein...

FEINSTEIN: And that the president does not have an overriding authority here?

KAGAN: Senator Feinstein, the way that the Solicitor General's Office has argued these cases and the entire Department of Justice has is on the basis of statutory authority; is on the basis of the AUMF, the Authorization for the Use of Military Force. And we have actually never argued that Article 2 alone would provide such authority.

And the question you raise really -- the usual framework that people use when they think about this question is something called Youngstown. So just -- of course, Justice Jackson's opinion in Youngstown.

And he sets forth three different zones. He says, "Well, in one zone, the president can act in accordance with congressional authority." And that is the easiest for a court to validate, to say, "Look, Congress and the president are acting together. The president is acting in specific accordance with what Congress has told the presidents to do." The courts should give real deference to that.

FEINSTEIN: But let me stop you here, because it's the three-prong test. We've discussed this in almost every Supreme Court confirmation hearing now. The concern is where there isn't legislation and -- or when the third prong, when legislation may say the opposite, can the president exceed that legislation? And how strong is his authority? You say it's not the commander-in-chief's authority. It's the AMU -- AUMF authority that prevails. Do I understand that correctly?

KAGAN: Yes. Essentially what the solicitor general's office and the Department of Justice has been arguing in these last two years is that we're in zone one, which is where the executive is acting with Congress' authorization, rather than in zone two where the executive is acting and Congress hasn't settled anything, or zone three where the executive is acting as against Congress' statements to the contrary.

So those would present very different issues whether the president has authority to detain where Congress has not said anything, or still yet, whether the president has the authority to detain where Congress has specifically deprived him of that authority. That would be a very different question indeed.

FEINSTEIN: OK. Let's talk about that for a moment because that's something I had something to do with, and that is expanding the exclusivity portion of the Foreign Intelligence Surveillance act to say that the executive authority may not exceed in statute the confines of this act. Would you find that as binding?

Well, Senator Feinstein, I would have to, you know, take a look at the statute and -- but I would say that the circumstances in which the president can act as against specific congressional

legislation, where the president can act despite Congress, are few and far between. And I think that that's what Justice Jackson said in *Youngstown*, and I think that that's what mostly the court has agreed with -- few and far between.

Now, are they nonexistent? Well, suppose Congress said something like, "We're going to take away the president's pardon power" -- a power that's specifically committed to the president by Article II. I think that that would be a hard case. I think the court might say, "Well, you know, notwithstanding that Congress tried to do that, Congress can't do that. The president has that power and it doesn't matter what Congress says about the matter."

But those are very few and far between. For the most part, the presumption is that the president, if told by Congress that he can't do something, can't do something.

FEINSTEIN: OK. Let me ask this: Does the president, in your view, have the authority to detain American citizens without criminal trial if they are suspected of conspiring to aid terrorists, of participating in acts of terrorism? Now, does your answer, then, depend on whether the individual is arrested in the United States or abroad?

(CROSSTALK)

KAGAN: Well, Senator Feinstein, I -- this will I think very much be a case that may come before the court, is the question of how detention authority, whether detention authority exists with respect to people who are apprehended in the United States. The court has not addressed that question so far.

The court has addressed in *Hamdi* only a person who was actually captured on the battlefield. The court has left open the question of whether detention authority might exist for a person captured outside of the battlefield, but outside of the United States, and also has left open the question of whether detention authority under the AUMF now I'm talking about, would exist as to a person captured in the United States.

There is a -- there is a Fourth Circuit decision on that subject. It's -- it's the *al-Marri* case where the court was very closely divided, where a slim majority of the court stated that the court -- that -- that there was detention authority under the AUMF to detain a person in military custody captured in the United States. That case was on its way to the Supreme Court, but never got there. It was mooted out because the person was transferred into civilian custody -- excuse me, into the regular criminal justice system. So that case did not come before the court in *al-Marri*, but it's -- it's very much a live possibility.

FEINSTEIN: Right. And we have just had a case. It came by a district court judge in California as of March 31st of this year -- the *Al-Haramain* case. And Senator Specter and I have discussed this. I mean, it's my understanding that what the judge did here was find the terrorist surveillance program illegal and essentially say that the plaintiff was entitled to damages from the government.

So I guess the question might be whether that case goes up to the Supreme Court or not. But clearly, the judge here dealt with something that was outside of the scope of law which was the terrorist surveillance program, and made a finding that it was in fact illegal.

KAGAN: I believe that that is what the judge said in that case, and that case is still pending, of course, and might come before the court. I think that the appropriate analysis to use with respect to that case, or many others in this area, would be the *Youngstown* analysis, which makes very important what Congress has done. Where Congress authorizes the president, it's one thing. Where Congress has said nothing, still another. Where Congress has specifically barred the activity in question, you're talking about a much, much higher bar for the -- the president to jump over in order for the action to be found constitutional.

FEINSTEIN: Thank -- thank you very, very much. If I might, let me go on to an environmental issue in the commerce clause. And as we all know, the commerce clause is used to legislative many different matters. I think the *Lopez* decision struck all of us very hard. That was a decision where the court held that it was a violation of the commerce clause to restrict guns within so many feet of a school.

In 1972, the Congress passed the Clean Water Act to restore and maintain "the chemical, physical and biological integrity of the nation's waters." That's a quote. The act prohibited the discharge of any pollutant into navigable waters without a permit issued by the Army Corps of

Engineers or the EPA. And for over 30 years, the courts and Congress gave these entities broad discretion to regulate water supply.

In a five-to-four ruling in 2006, the court reversed course and said that the Army Corps had exceeded statutory authority in limiting pollutants in certain wetlands. In California, these decisions have left seasonal streams unprotected by the Clean Water Act, opening them up to development, prone to flooding that were formerly protected areas.

Further, the ambiguity left by the court's decision has left EPA and the Army Corps with little clarity on the bounds of their jurisdiction under the act, leading to agency expenditures on establishing and defending their jurisdiction, rather than on enforcement.

Here's the question. When do you believe it is appropriate for a court to overturn the reasoned decision of a federal agency that action is needed pursuant to a statute?

KAGAN: Senator Feinstein, I don't know the -- the case that you mentioned at all. But I think the typical approach of a court, obviously, when it interprets a statute -- and this is very important -- is to figure out what Congress meant when it enacted that statute; that a court's -- that a court acts outside its proper boundary in trying to impose its own meaning on a statute or to improve on the meaning that Congress gave to the statute; that instead, the legislative power is Congress's and what the court is supposed to do is to figure out what Congress meant.

Now, sometimes that's not so easy. Because sometimes language is imprecise; new circumstances develop; it's unclear how Congress intended for a statute to apply; or sometimes Congress is even -- just, they make a mistake; they're careless, whatever.

(LAUGHTER)

Sometimes you do that, right?

But -- so sometimes there's -- there's some lack of clarity, some ambiguity in a statute. And there, the appropriate course, the course that the court has chosen -- and I've written about this in my scholarly work -- is to give deference to the agency.

And the idea of the -- the law in this area -- it's called the Chevron doctrine. The idea of the law is that Congress, in enacting a statute and in giving authority to the agency to implement that statute, has impliedly delegated power to the agency to clarify any ambiguities that might arise in that statute, and that it's more appropriate for an agency to clarify those ambiguities than it is for a court to do so.

And that's why Chevron says the courts are to give deference to the agency. And -- and I have written about this a good deal. My field is administrative law, and I've written about the chevron doctrine. It's an important doctrine, for the reason I just said, that -- that, when there are ambiguities in a statute; when it's unclear how a statute should apply to a particular kind of administrative action, one possibility is that the court gets to decide that. The other possibility is that the administrative agency gets to decide that.

The court says in Chevron, it's better for the agency to do so because the agency has more competence in the area; it has more expertise in the area because the agency has some political accountability, which courts do not have, and also because we think that -- that Congress would have made that choice, that Congress would have wanted the entity with political accountability and with expertise to make the decision rather than the courts.

And in that sense, Chevron is actually a great example of -- of courts saying that the court's own role should be limited; it should be limited -- there, it's with respect to an administrative agency that really has expertise and that has political accountability.

FEINSTEIN: Thank you. That's very helpful.

Let me ask a quick question, in my remaining time, on standing. With many environmental statutes, such as the Clean Water Act, the Endangered Species Act, the Clean Air Act, Congress has included provisions permitting citizens or citizen groups to bring lawsuits to redress violations of the law.

When regulatory agencies fail to do their jobs for any reason, be it incompetence, corruption, political interference, lack of resources, citizen suits provide a means for private citizens to step forward and ensure that our nation's environmental protections are not ignored.

In a series of cases, it's been argued, however, that citizens do not have constitutional standing to bring these cases because they cannot prove that they have been personally and concretely harmed by global warming, the pollution of waterways or the depletion of species.

So here's the question. Do you believe it's possible for citizens to demonstrate that environmental harms have injured them for constitutional purposes?

KAGAN: Senator Feinstein, the answer is yes, depending on -- much depending on what Congress does. So let me step back for a minute.

Article III has what's called a Case or Controversy requirement. And this is a very important aspect of the judicial system. It's really the -- one of the things that keep judges judging and not doing anything else, which is that they can only decide concrete cases or controversies. They can't make pronouncements on issues, legal or otherwise. They can't issue advisory opinions. They can only decide cases or controversies.

And one important aspect of what it means to be a case or controversy is that a person has standing to bring that case. And there are usually considered to be three requirements for that standing. First, a person has to have suffered an injury. Second, the person has to show that that injury was caused by the action that she's complaining about. And third, the person has to show that the relief that the person is seeking from the court will actually redress the injury.

And all of those are important. They're all actually constitutional requirements.

Now, that injury can be of many different kinds. It can be economic injury, but it can also be a kind of injury that you get when the environment is degraded and you can't use the parks in the way you would have wanted to use the parks.

FEINSTEIN: Like asthma in L.A. from ozone?

KAGAN: It can -- the injury can be of a kind like that, certainly.

Now, the court has said that people have to have -- be able to show that that person specifically has been injured. And there's -- there's some sort of specificity and concreteness requirement that the court has used in the stand in question.

But the court has also made clear that Congress can define, within broad limits, a -- a set of people who Congress believes has -- is injured by a particular practice such that they can bring suit.

So the standing question is one that I think is not entirely, but to a great extent within Congress's control, that Congress can say, look, there are, you know, some set of people, and it gets to define those people as it wants who are injured by some kind of action and who should have an entitlement to go to court to redress that action.

FEINSTEIN: In legislation? In other words...

KAGAN: That's right, that Congress does that in legislation, and if Congress does do that in legislation, within broad limits, as I say, but if Congress does, the court should respect that and should hold that such a suit -- such a suit complies with Article III.

FEINSTEIN: Thank you very much.

Thank you, Mr. Chairman.

LEAHY: Well, thank you very much, Senator Feinstein.

We will take a short break, about 10 minutes, and -- and then come back. Again, I appreciate senators on both sides staying within their allotted time.

We will have one change. Normally, we go to Senator Grassley, but because of a conflict in scheduling, we're going to switch and we'll go to Senator Kyl when we come back in. That's with the concurrence of both -- both the senators.

We stand in recess.

(RECESS)

LEAHY: Thank you all.

Getting back to the schedule, we'll go to Senator Kyl. Then we'll go to Senator Feingold. Then we'll break for lunch and come back. Emerging senators will be next in line after that to vote at the desk on that 215 (ph) vote and come back here. That's what I intend to do. And I will then recognize whoever is next in line so we can go.

Senator Kyl?

KYL: Thank you.

General Kagan, you can see how important my colleagues think my questions are here.

LEAHY: I'm here.

KAGAN: Or how important my answers.

(LAUGHTER)

KYL: Well, when we -- when we met, I tried to give you an idea of the questions that I would ask, and I think I can pretty much follow what I laid out to you, so let me do that. I also think most of my questions can be answered pretty succinctly, and I would appreciate if you could do that.

So let me start by asking you the standard for judges in approaching cases that we talked about, starting with the president's idea. I'll remind you, he's used a couple of different analogies.

One was to a 26-mile marathon and said that in hard cases adherence to precedent and rules of construction and interpretation will only get you through the first 25 miles. And he has said that while the law is sufficient to decide 95 percent of cases, in the last 5 percent legal process alone will not lead you to the rule of decision. He says the critical ingredient of those cases is supplied by what is in the judge's heart, or the depth and breadth of a judge's empathy.

My first question is, do you agree with him that law only takes you the first 25 miles of the marathon and that the last mile has to be decided by what's in the judge's heart.

KAGAN: Senator Kyl, I think it's law all the way down. It's -- when a case comes before the court, parties come before the court, the question is not, Do you like this party or do you like that party? Do you favor this cause or do you favor that cause? The question is, and this is -- this is true of constitutional law, it's true of statutory law -- the question is what the law requires.

Now, there are cases in which it is difficult to determine what the law requires. Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult. And -- and -- and people can disagree about how the constitutional text or precedent, how they apply to a case. But it's law all the way down, regardless.

KYL: In the time of sentencing, a trial court might be able to invoke some empathy, but I can't think of any other situation where, at least off the top of my head, it would be appropriate. Can you?

KAGAN: Senator Kyl, I don't know what was in the -- I don't want to speak for the president, I don't know what the president was speaking about specifically.

I do think that in approaching any case a judge is -- is required really, not only permitted, but required to think very hard about what each party is saying, to try to see that case from each party's eyes, in some sense to think about the case in the best light for each party, and then to weigh those against each other.

So I think that the judge is required to give consideration to each party to try to figure out what the case looks like from that party's point of view. That's an important thing for a judge to do.

KAGAN: But at the end of the day what the judge does is to apply the law. And as I said, it might be hard sometimes to figure out what the law requires in any given case, but it's law all the way down.

KYL: Statutory Constitution -- the precedent?

KAGAN: That -- that's correct.

KYL: Now, when the president announced the retirement of Justice Stevens, he said "Judges" -- this is a slightly different formulation, so the next question has to do with the second way that he formulated -- he said, "Judges should have a keen understanding of how the law affects the daily lives of the American people, and know that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens," was the way he put it.

Now, the media outlets have summarized this and called it the fight for the little guy sensibility. I'm not sure that's exactly the way the president would put it, but you heard some of my colleagues here yesterday lament the alleged activism of the current court in supposedly always ruling for the corporate interests or the interests of big business.

Do you agree with the president and my colleagues that judges should take into account whether a particular party is a big guy or a little guy when approaching a question of law? Or that one side is powerful or that one side is a corporation?

KAGAN: Well, here's what I think. I think that courts have to be level playing fields and everybody has to have an opportunity to go before the court, to state his case, and to get equal justice. And one of the glorious things about courts is that they do provide that level playing field in all circumstances, in all cases.

And when that level playing field is not provided by other branches of government, even when there is some imbalance with respect to how parties come to Congress or the president or the statehouses, that the obligation of the courts is to provide that level playing field, to make sure that every single person gets the opportunity to come before the court; gets the opportunity to make his best case and gets a fair shake.

KYL: Now, may I just interrupt? When you say level -- to ensure a level playing field, you're not saying that if the parties come to court with positions that are unequal, that is to say one party's position is better the other party's position, that the court's obligation is to try to somehow make those two positions the same?

KAGAN: No, no, no. I mean, it's just a matter of everybody is entitled to have his claim heard. Everybody is entitled to fair consideration. It doesn't matter whether you are an individual or you're a corporation or you're the government.

I mean, one of the -- one of the really remarkable things about watching, actually, a Supreme Court argument is sometimes I go up there and I am arguing for the government. Very, sort of, I mean, you would think it's kind of a favored position to be arguing for the government. And it turns out it's not. It turns out the justices give you, as the government's representative, just as hard a time - - maybe a harder time -- than they give anybody else. And that's the way it should be.

Whether you are the government, whether you're a corporation, whether you're a person, no matter what kind of person you are, no matter what your wealth, no matter what your power, that you get equal treatment from the court. And what I meant by "equal treatment" is just the court takes your claim seriously, takes your case seriously, listens to you as hard as it listens to anybody else, and then makes the right decision on the law.

KYL: During his confirmation hearing, Chief Justice Roberts said, "If the Constitution says" -- this was in response to a question by the way, and he said, "if the Constitution says that the little guy should win, the little guy is going win in a court -- in court before me. But if the Constitution says that the big guy should win, well then the big guy is going to win because my obligation is to the Constitution. That's the oath."

Do you agree with Chief Justice Roberts?

KAGAN: I do, Senator Kyl.

KYL: Now, one of the things that -- that I brought up in my opening statement was obviously your clerkship for Justice Marshall, and my belief that Justice Marshall's views are more along the line of viewpoint that President Obama expressed. And you wrote about this on more than -- in more than one way. Let me just cite one thing you wrote about Justice Marshall's view, and I'm quoting now.

You said, "In Justice Marshall's view, constitutional interpretation demanded above all else 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 interest of people who had no other champion. The court existed primarily to fulfill this mission," you wrote about Justice Marshall. And in fact, you also wrote that "if he had his way, cases involving the disadvantaged would have been the only cases the Supreme Court heard."

What's unclear to me is whether you agree with Justice Marshall's view of the role of the court in constitutional interpretation.

KAGAN: Senator Kyl, the last statement you read, the statement about it would be the only case, I think that that was a kind of jokey statement, so I would put that aside.

KYL: OK.

KAGAN: I think what I was saying in that piece is consistent with what I've said to you. I think Justice Marshall's whole life, and this is why I said he revered the Supreme Court, Justice Marshall's whole life was about seeing the courts take seriously claims that were not taken seriously anywhere else.

So in his struggle for racial justice, you know, he could go to the statehouses or he could go to Congress or the president, and those claims generally were ignored.

KYL: Well, let me just interrupt you for a second. You wrote here that in constitutional interpretation, so this is not just a factual matter between two parties. We're talking about interpreting the Constitution. He says the courts should show a special solicitude to...

(CROSSTALK)

KAGAN: I think -- I think that was my words, and I meant...

KYL: Yes, correct.

KAGAN: ... "special" as compared with the other branches of government. In other words, that it was the court's role to make sure that even when people have no place else to go that they can come to the courts and the courts will hear their claims fairly. And that was what I was saying was a wonderful thing about courts, a miraculous thing about courts, that -- that you can be ignored in every other part of the government, and you can come to a court and a court will say, "It's our job to treat you with respect, with consideration, with -- with the same kind of attention we give to everybody else."

KYL: Well, let me just ask you, do you believe, then -- and it's hard, I realize, though you certainly know -- you knew Justice Marshall very well you knew his reasoning, that he would have agreed with Justice Roberts that if the big guy has the law on his side, the big guy wins; if the little guy does, then the little guy wins. And that's consistent with what Justice Marshall believed? Or would he have expressed it more along the lines that some of my colleagues have here, that there's too much agreement with the corporate interests and big business, as one of my colleagues put it?

KAGAN: Senator Kyl, I guess two points. The first is, I guess I don't want to spend a whole lot of time trying to figure out exactly what Justice Marshall would have said with respect to any question, because the most important thing -- I love Justice Marshall. He did an enormous amount for me. But if you confirm me to this position, you will get Justice Kagan. You won't get Justice Marshall, and that's an important thing.

KYL: Yes, and I -- I totally agree with you. It's not what Justice Marshall believed that's important here. It's what you believe. Since you have written so glowingly about him, you called in fact his vision of the court "a thing of glory," I believe. I'm having a hard time figuring out whether to the extent that you do and you have written glowingly about him, whether you would tend to judge in cases more actively or more with interest in protecting the rights of those who are disadvantaged, for example, or, as you have already expressed here, you would simply base it on the facts and the law and the Constitution.

KAGAN: The thing of glory, Senator Kyl, is that the courts are open to all people and will listen respectfully and with attention to all claims. And at that point, the decision is what the law requires. And there may be differences as to what the law does require, but it's what the law requires and that's what -- what matters.

I guess I would like to go back to -- I will just give you one case just to make sure that...

KYL: Well, could I just keep moving on? I know the time -- well, we don't have a lot of time, if I could please.

Do you agree with the characterization by some of my colleagues that the current court is too activist in supporting the position of corporations and big business?

KAGAN: Senator Kyl, I would not want to characterize the current court in -- in any way. I hope one day to join it.

(LAUGHTER)

KYL: And they said -- and they've said you're not political, right?

(LAUGHTER)

KYL: I appreciate it.

Let me explore your judicial philosophy just a little bit more here, whether you agree with the comment that Justice Marshall said. He said you "do what you think is right and then let the law catch up."

Do you agree that that's the right way to approach judging?

KAGAN: The way I would judge is -- is the way I told you, that you make sure that you give very respectful consideration to every person and then determine what you think the Constitution or a statute, if the case is a statutory case, requires.

KYL: So you wouldn't have phrased your philosophy as Justice Marshall phrased his?

KAGAN: You know, I actually never heard Justice Marshall say that. I know another co-clerk -- another clerk in a different year wrote that she did. I will say Justice Marshall was a man who spent many decades of his life fighting for the eradication of Jim Crow segregation. And you can, kind of, see why he thought that you should work as hard as you can...

KYL: He worked outside the box.

KAGAN: ... and eventually the law will catch up.

KYL: Yes...

KAGAN: And eventually the law did catch up, in *Brown v. Board of Education*...

KYL: That's why it didn't seem to me to be out of character for him to have said that.

Is there anything that you've written -- obviously, you haven't rendered decisions which would enable us to verify that this is your approach to judging.

Can you think of anything you've written, or if you'd like to just supply this for the record, if it doesn't come to you immediately, that would verify what you have said for us here, that would help us to confirm that what you've expressed to us today is, in fact, a view that you've expressed about judging?

KAGAN: Well, I don't think I have written anything about judging in that way. But I think that you can look to my life, that you can look to the way I interact with people. I mean, my deanship was a good example, but the way I have acted as solicitor general, as well, the kind of consideration that I've given to different arguments, the kind of fairness that I've shown in making decisions. I think that those would all be, you know, appropriate things to look to, to try to get some understanding of this aspect of me.

KYL: OK. Let me ask you about some of the bench memos. I talked to you, a little bit, about that when you were in my office as well. And, obviously, we only have time to mention a few, but what I was suggesting is that your advice to your boss seemed to be not just pragmatic but almost political in advising him either to -- to vote to take a case or not to take a case on cert.

For example, in *Lanzaro v. Monmouth County*, you wrote, and I quote, "Quite honestly, I think that, although all of the lower court's decisions is well-intended, parts of it are ludicrous."

But you discouraged Justice Marshall from voting to review the decision because you were afraid that the court -- and I'm quoting now -- "might create some very bad law on abortion and/or prisoners' rights."

Now, when deciding whether or not to take a case, shouldn't the focus be on whether the appellant or the appellee has the facts and the law on their side, rather than worrying about whether justices might, in your view, make bad law?

KAGAN: Senator Kyl, let me step back just a little bit and talk about what clerks did for Justice Marshall. We wrote -- Justice Marshall was not in what's called the cert pool. We wrote probably thousands of memos over the course of the year about what cases the court should take and what cases the court not take.

And when we -- when I was clerking for Justice Marshall, I was -- I was 27 years old and Justice Marshall was an 80-year-old icon, a lion of the law. He had firm views. He had strong views. He knew what he thought about a great many legal questions. He had been a judge for some fair amount of time.

And the role of the clerks was -- was pretty much to channel Justice Marshall, to try to figure out whether Justice Marshall would want to take a case, whether Justice Marshall would think that the case was an appropriate one for the court to take and set aside. And that's what I did and I think that that's what my co-clerks did as well.

KYL: Well, do you think you would approach certain decisions that way if you were on the court?

KAGAN: I think that the most important factors in the cert decision process, which is, I think, one that I talked to Senator Kohl about, maybe -- the ones I gave. First, most importantly, are the question of circuit conflicts, that the court -- it's a very important responsibility of the courts to make sure that our law is uniform and to resolve any conflicts that appear among the circuit courts.

Second is the court should be available almost all the time where a judicial decision invalidates a congressional statute, that Congress is entitled to that kind of respect, to have the Supreme Court hear the case before a congressional statute is invalidated.

Third, you know, for some set of extremely important national interests, extremely important for any number of reasons -- it's a small category of cases, but it's an important one. And I think that those would be the considerations that I would primarily use. And those would -- those would -- that is the way I would make decisions.

KYL: All right. There are -- some of these bench memos suggest other bases for making decisions. For example, in *Cooper v. Kotarski*, in assessing whether the court should take the case, you wrote, quote, "It's even possible that the good guys might win on this issue."

Now, that wouldn't be a very good basis on which to suggest taking a case, would it?

KAGAN: As I...

KYL: And who were the good guys?

KAGAN: As I took a look at that memo, Senator Kyl, I was -- that was just a reference to the people whom I thought Justice Marshall would favor on the law. And that's -- that's all the reference was meant to suggest, just the people whom I thought Justice Marshall would think had the better of the legal arguments.

KYL: Well, the reason I cited that one is there is a note, while you were at the White House; you were asked whether certain -- or you asked a colleague, rather, whether certain organizations were on a list of organizations eligible for certain tax deductions, and you referred to two of them. One was the NRA. The other was the KKK. And you referred to them as, quote, "bad-guy orgs." I presume an abbreviation for organizations."

So if you're presented a case involving, for example, the NRA, would you consider the NRA to be a bad-guy org, deserving of defeat in the case?

KAGAN: Senator Kyl, I'm sure that that was not my reference. The notes that you're referring to are notes on a telephone call, basically me jotting down things that were said to me. And I don't remember that conversation at all, but just the way I write telephone notes is not to quote myself...

KYL: OK, so your -- your belief is that you were quoting someone else when you wrote "bad-guy orgs"?

KAGAN: Or paraphrasing somebody else. But it's not -- it was just telephone notes.

KYL: And it wasn't your terminology; it was somebody else's?

KAGAN: Or -- as I said, or a paraphrase. But it was -- it was -- you know, the way I write telephone notes is just to write down what I'm hearing.

KYL: You wouldn't, in any event, put the NRA in the same category as the KKK, I...

(CROSSTALK)

KAGAN: It would be a ludicrous comparison.

KYL: Thank you.

In another case, in recommending the -- this is *United States v. Kozminski* -- in recommending the grant of cert, you noted that the solicitor general was, quote, "for once on the side of the angels."

Now, obviously, it's not whose side you're on that makes...

KAGAN: I hope that's not my good friend Charles...

(CROSSTALK)

KYL: Indeed it was -- it is.

(LAUGHTER)

It is and was. How do you define who's on the side of the angels?

(LAUGHTER)

KAGAN: I -- you know, I didn't -- I have not seen that memo, Senator Kyl, but I'm sure it was -- it was saying essentially the same thing, which was the solicitor general had the better of the legal arguments, as Justice Marshall would understand the legal arguments.

KYL: For once, you said?

KAGAN: I'm sorry, Charles.

(LAUGHTER)

KYL: Well, have -- in your time as S.G., have you made any litigation decisions based on an assessment of which position was the side of the angels?

KAGAN: I've tried very hard, Senator Kyl, to -- to take the cases and to make the decisions that are in the interests of my client, which is the United States government.

KYL: And it wouldn't be appropriate, as a member of the Supreme Court, to decide cases based on that, either?

KAGAN: Senator Kyl, the -- a Supreme Court justice needs to decide cases on his or her best understanding of the law.

KYL: Let me ask you, in the minutes that remain here, about one of the decisions that you made in connection with a request by the court for the S.G.'s opinion.

The case is Chamber of Commerce v. Candelaria. This is an Arizona decision. You'll recall it involved a 2006 law that then governor of Arizona Jane Napolitano had signed, and which requires all employers doing business in Arizona to participate in the federal government's E-Verify system that verifies Social Security status and also provides that employers who knowingly employ illegal aliens can be stripped of their business licenses.

Several groups challenged the Arizona law, saying it was pre-empted by federal immigration law, but the federal district court in Arizona and a unanimous Ninth Circuit panel upheld the law.

KYL: The opponents of the law asked the Supreme Court to take the case and strike down the Arizona law. And last November the Supreme Court asked you as solicitor general for the government's views.

Ultimately, you decided to ask the Supreme Court to take the case and strike down the employer sanctions that are critical to making the Arizona law work. You and I talked about this case, and you're familiar with it...

KAGAN: Yes.

KYL: ... to discuss it. You did not argue that the court should take it because there was a split in the circuits.

KAGAN: That's correct, Senator...

KYL: Or that there had been an unconstitutional application of the law in anyway?

KAGAN: Senator Kyl, I think what we argued in the petition was that the -- the Arizona statute, or at least this part of it, was pre-empted by Congress, and therefore that the decision below was -- was wrong. And that the reason for the courts to take the case was not only that it was wrong -- because the Arizona statute was statutorily pre-empted, but -- but also because this was an important question. It's one of the category of cases where...

(CROSSTALK)

KYL: It's that third category you said...

KAGAN: Third category...

(CROSSTALK)

KYL: ... there aren't very many, but where they are, they're important.

KAGAN: That's right. Lots of states are passing this -- these -- these -- these kinds of laws and that guidance from the Supreme Court would be appropriate as to what kinds of legislation...

(CROSSTALK)

KYL: Well, the Supreme Court isn't in the business of giving guidance, though, is it?

KAGAN: Well, I think for the Supreme Court to set down its view of what the federal statute pre-empts would be very helpful to state legislatures.

(CROSSTALK)

KYL: Sure, but -- I mean, the court turns down hundreds of cases, and I'm sure its ruling in each case would be helpful.

As I recorded your comment earlier this morning in that third category you said that it would have to be a strikingly significant issue for the court to take the case in that third category of an important federal question.

KAGAN: Senator Kyl, what we argued to the court in...

(CROSSTALK)

KYL: You said it should be a strikingly significant issue, did you not?

KAGAN: I'm -- I'm honestly not sure...

(CROSSTALK)

KAGAN: ... words I used. But if I might, Senator Kyl...

KYL: Go ahead.

KAGAN: ... what we argued to the court in *Candelaria* was that there was a federal statute in this case -- I know that -- look, there was a federal statute in this case. Our best read of that federal statute was that it pre-empted the licensing provision of the Arizona law. That was our best understanding of what the federal statutes did.

And that because there's so much legislative activity in this -- in this area happening across this country right now, that for the Supreme Court to decide that question and to determine whether the federal statute pre-empted the state law was one of those moments where -- (inaudible) the issue is of -- of real significance across the country.

KYL: So you think that that made it strikingly significant?

KAGAN: I think that this is a significant issue, as -- and -- and people, I think, on both sides agree that it is a significant issue as to whether the federal statute prevents states from doing this.

And it's -- this is, again, not a decision or a view as to whether these state statutes are good or bad. They might be very good. The only question is whether Congress has (inaudible) legislation...

KYL: Right. OK.

KAGAN: And here the legislation was in the immigration...

KYL: And here's what the federal law -- I mean it does -- it says, this is an area for the federal government. But, under the federal law, states are explicitly permitted to legislate in this area -- and I'm quoting the statute now -- "through licensing and similar laws" -- "through licensing and similar laws."

And you argued in your brief that the states revoking of a license didn't qualify for that explicit exception to federal pre-emption under the federal statute. Right?

KAGAN: Senator Kyl, what we argued in the brief was that the Arizona law did not qualify under that exception. Because what that exception was meant to talk about were sort of traditional licensing laws, of the kind when, you know, you license a lawyer or you license a doctor, or you license a chiropractor, but not a law that essentially imposes sanctions on any employer for hiring illegal aliens.

KYL: Well, but this was a statute that dealt with -- the federal statute deals with hiring people who are not qualified to be hired in the country, who are called illegal aliens. And it said that the federal government has the pre-emption in this area except where states pass laws through -- or attempt to deal with the issue through licensing and similar laws.

So wasn't it inferred there that the court meant for states to be able to do exactly the kind of things that the state of Arizona did? It wasn't limited to licensing a professional. It was the denial of a license to someone who was violating the law.

KAGAN: Yes, we definitely took a different position, Senator Kyl. And the reason we did is this statute clearly would prevent a state from saying anybody who hires an undocumented or illegal alien would be fined \$25. The statute clearly prevents a state from saying that, from imposing a penalty on an employer who hires an illegal alien.

And if the statute clearly prevents a state from imposing a penalty like that, then surely the statute also prevents a state from imposing a penalty, which is the withdrawal of any of the...

(CROSSTALK)

KYL: Well, that's -- that's the argument that you make. But -- the federal government could impose a fine, but the federal government doesn't get into the licensing of businesses. That's a state activity.

So I could argue just as easily -- and I'm sure the court will consider the argument -- that of course that's the kind of things that states can do. And so just as a state could grant a license, it would also take a license away if a business violated the law.

We'll talk a little bit more about this, I guess, in the -- in the second round. But the reason that I raise this is that -- my guess is -- and I would ask you whether you agree -- that without the S.G. having taken the position that you did that it's much less likely that the court would have taken the case. Would you agree with that?

KAGAN: You know, I don't know that, Senator Kyl. Sometimes they listen to us and sometimes they don't. Sometimes we tell them in no uncertain terms, "This is a terrible case to take," and they take it anyway.

KYL: Well, the stats are 80 percent, so that's a pretty good percentage, when you ask them to take a case and they do.

LEAHY: (inaudible) Was this the case where the Supreme Court asked the solicitor general to file a brief?

KYL: Yes.

KAGAN: This is a case where...

(CROSSTALK)

KAGAN: ... and those -- the 80 percent statistic, I think, is the statistic when the government files its own cert petition. I think that we do much less well with the court when we -- when we just -- when we answer the court's requests for, you know, our advice on whether...

(CROSSTALK)

KYL: When we have the next round, I'll have the exact statistics.

(CROSSTALK)

KAGAN: I hope we do well.

KYL: I think you do very well.

KAGAN: OK.

(CROSSTALK)

LEAHY: Senator Feingold?

And then when Senator Feingold finishes, we will -- we will break. And I would reiterate to senators -- and Senator Kyl, you're in the leadership, you probably know this. But apparently the vote is at 2:15. I'll vote at the desk and come back, and I will recognize the next person in line -- should be on the Republican side.

Senator Feingold?

FEINGOLD: Thank you, Mr. Chairman.

And thank you, again (inaudible).

I guess I'd like to start by picking up on your discussion with Senator Hatch about the Citizens United decision. Senator Hatch talked about a book with a single mention of a candidate and pamphlets designed by small S Chapter corporations.

But, of course, as you indicated already, what Congress addressed in the McCain-Feingold bill was TV and radio election advertising right before the election, paid out -- paid for out of the treasury funds of unions and corporations, both profit and non-profit.

So was the Supreme Court that instead reached out and asked for re-argument, and called into question a 100-year-old statute that prohibited corporations more generally from spending money on elections. I just want to clarify this. So let me ask you: Wasn't it highly unusual, if not unprecedented, for the court to do this?

KAGAN: Senator Feingold, the United States government in the case did urge the courts not to decide the case on the grounds, but it did. And -- and, you know, it's -- it's obviously unusual whenever the court reverses a precedent in this way. The court thought it had grounds to do so, but it is an unusual action, yes.

FEINGOLD: And wasn't it unusual how they got to the point where they can make that decision, based on the facts?

KAGAN: Senator -- Senator Feingold...

FEINGOLD: It was unusual, wasn't it?

KAGAN: Senator Feingold -- certainly the case, as it came to the court, did not precisely address -- did not address the question that the court ended up deciding.

FEINGOLD: Thank you.

And the reason that many people, including the president and many members of the committee, were so outraged by the decision was not simply because the court reversed its 2003 decision upholding the issue -- ad provisions of the McCain-Feingold bill -- but it also reached out to decide an issue that was not raised in the case at hand, and overturned settled law dating back more than a century.

FEINGOLD: Did it surprise you that the court's decision caused such an uproar?

KAGAN: Oh, I don't know, Senator Feingold. I'm not -- I'm not, you know, an expert in -- in public reaction to things, and I don't think that the court should appropriately consider the public reaction in that -- in that sense.

FEINGOLD: Do you take note of the public reaction to Supreme Court decisions?

KAGAN: Senator Feingold, I -- I -- I read the same newspapers that everybody else does.

FEINGOLD: But you're not willing to comment on whether this was a greater reaction than in other...

KAGAN: I don't know, Senator Feingold.

FEINGOLD: All right. Let me go national security issues that you already discussed a bit with Senator Feinstein.

I think it's safe to say that you agree that the Youngstown concurrence is the appropriate starting point for these types of questions having to do with whether a statute is something that can be overridden.

Go back to your understanding of how to apply Justice Jackson's test. Specifically, do you read it to allow for any circumstances where the president could authorize a violation of the criminal laws that Congress has passed?

KAGAN: Where the president could authorize the violation of criminal laws that...

FEINGOLD: Congress has passed.

KAGAN: ... Congress has passed?

Senator Feingold, I couldn't think of any circumstance offhand. I don't want to say categorically that there might never be one if something was very much at the core of presidential power under Article II. But it's -- it's -- it's -- it would be a highly, highly unusual circumstance.

FEINGOLD: You used the phrase "few and far between." But when pressed about a circumstance where it could occur, the example you gave was not something out of Article II. What you -- or out of the commander in chief power.

What you suggested was that, of course, there could be a situation where Congress passes a law that would violate, let's say, the explicit pardon power, which of course I concede. But do you know of any examples of where this could occur simply within the context of the commander in chief powers under Article II?

KAGAN: Well, it's interesting, Senator Feingold, because I think I read someplace where you stated a hypothetical which was suppose Congress made somebody else commander in chief and the president said, "I'm going to ignore that and I'm going to continue to be commander in chief." I don't know where I read that, that you had said that. It struck me as a good example of something where, you know, that's core commander in chief power.

FEINGOLD: But you know of no actual example in any court case where the Supreme Court has upheld a presidential assertion of this power in a way that would override a criminal statute. Is that correct?

KAGAN: I do not know of any court case like that. That's correct.

FEINGOLD: Let me ask you a question. I asked Justice Alito about this. What is the proper role here of the judiciary in resolving a dispute over the president's power to disobey an expressed statutory prohibition?

KAGAN: I think that the court has an important role. I mean, the court, generally, I think, has a very important role in policing constitutional boundaries. And that might be policing the boundaries when Congress or some other governmental actor violates somebody's individual rights in a way that's not permitted by the Constitution or it might be a case in which one branch impermissibly interferes with another branch or impermissibly infringes on the appropriate authority of another branch.

So there is some category of cases, of course, as between the political branches that courts sort of have left to the political branches to work out themselves. And to the extent that the political branches can work their problems out by themselves, I think that that's generally considered and it's generally right to be considered a good thing.

But there are some times when the court really does have to step in and police those boundaries and make sure that the president doesn't usurp the authority of Congress or vice versa.

FEINGOLD: 2007 you gave a speech to Harvard Law School graduates about the rule of law, and you talked about an infamous incident where Attorney General John Ashcroft was asked to authorize an illegal government program while hospitalized for an emergency operation and he refused. And you told the graduates that they, too, would, quote, "face choices between disregarding or upholding the values embedded in the idea of the rule of law," unquote.

What prompted you to discuss this theme and this incident in that speech? And do you think that this incident holds lessons for Supreme Court justices as well?

KAGAN: Senator Feingold, it was a speech I gave to the graduating class. When I speak to students, and particularly when I speak to them in important moments in their life like graduation, when they're really thinking about what careers they want to have in the law, you know, I try to tell them some things that will stick with them and be meaningful to them and some things that I think it's important for them to keep in mind as they -- as they start their careers.

And the rule of law and adherence to the rule of law, there's no more important thing for any law school graduate to keep in the forefront of his or her mind than that.

And -- and -- and that was a speech where I thought that there were some current day incidents, as well as I used some historical incidents to just talk about -- about the rule of law, about how no person, however grand, however powerful, is above the law; to talk about the importance of adhering to the law, no matter the temptations, no matter the pressures that one might be subject to in the course of one's career. And I think that there's nothing more important than that, and that's what I tried to express in that speech.

FEINGOLD: What was it about the Ashcroft incident that fit that category?

KAGAN: Well, that was -- that was one of the examples I used as Senator Ash -- then Attorney General Ashcroft really taking a very principled stand. And I thought that that was notable and pointed that out, along with a number of others where people -- where people have taken very principled stands, notwithstanding some considerable amount of pressure to do otherwise.

FEINGOLD: Thank you.

Let's turn to the Second Amendment. I've long believed that the Second Amendment grants citizens an individual right to own firearms. I was pleased when two years ago, in the Heller decision, the Supreme Court agreed with this view. And as you know, the Second Amendment on its face applies only to the federal government, not to the states, but of course the court just ruled in the McDonald case that the Second Amendment rights apply to the states via the 14th Amendment's guarantee of due process of law.

Now, there will undoubtedly be more cases in the future that test the limits of the government's ability to regulate the ownership of firearms. The court in Heller specifically indicated that prohibitions on the possession of guns by felons and the mentally ill, laws forbidding guns in sensitive places such as schools and government buildings, and concealed-carry restriction could pass muster. And the court indicated that the examples it gave of permissible restrictions was not an exclusive list.

Now, you worked on gun issues when you were in the Clinton White House, so you're familiar with the kinds of restrictions that Congress has considered, and you're obviously familiar with these Supreme Court cases.

Can you give us a sense on how you would approach a challenge to the constitutionality of a law or regulation that restricts gun ownership short of the outright ban and the trigger lock requirement that were overturned in Heller?

In other words, how in your view should a Supreme Court justice go about deciding whether a law infringes on Second Amendment rights?

KAGAN: Well, Senator Feingold, I think that the court -- I have not -- first, I should say I have not read all the way through the McDonald decision because it came out yesterday. But I think that it does not suggest anything to the contrary of what I'm going to say.

I suspect that going forward the Supreme Court will need to decide what level of constitutional scrutiny to apply to gun regulations. Some people read Heller to apply strict scrutiny. Other people think that Heller suggests a kind of intermediate scrutiny. I've seen sort of both views of that decision. It's clearly a decision that will come before the court.

I think, as you said, the Heller decision clearly does say that nothing in it is meant to suggest the unconstitutionality of certain very longstanding kinds of regulations, and the felon in possession example is the first on that list. But the court also says that the list is not exhaustive.

And so I think that there will be some real work for the court to do in this area.

I should say that the work that I did in the Clinton White House was all work, of course, before Heller was decided, and so we really didn't, you know, apply this kind of scrutiny, this kind of examination to those -- to those decisions.

What President Clinton was trying to do back in the 1990s and what I as his policy aide was trying to help him do was to propose a set of regulations that had very strong support in the law enforcement community, that had actually bipartisan support here in Congress to keep guns out of the hands of criminals, to keep guns out of the hands of insane people. It was very much an anti-crime set of proposals that I worked on back then in the '90s.

KAGAN: And, you know, I think that we did not consider that those regulations, through the Heller prism, just because Heller didn't exist at that time, but I do think that -- that these cases may be coming before the court and the court will consider, sort of, regulation by regulation, which meets its standard.

FEINGOLD: Going back to campaign finance issues, I -- again, because of your work in the Clinton White House and your advocacy for the government's position on the Citizens United case, you're very familiar with this area. I obviously care a lot about this issue, and so I'm pleased that, obviously, your learning curve isn't very steep on this topic.

But I'm sure that you've heard that Senator McConnell has attacked you because of your previous work as a policy aide in the area. He thinks you approach election law as a political advocate and that you are committed to a political agenda.

And he says that's, quote, "the very opposite of what the American people expect in a judge," unquote.

I think it's important to point out that, when you were in the White House Counsel's office, you had the job of evaluating the constitutionality of various policy proposals. And there, you weren't shy about expressing doubts about whether certain ideas could survive a constitutional challenge.

For example, in a note to Jack Quinn that was in the documents provided to the committee, you said, "I think it's pretty clear that a ban on non-citizen contributions would be unconstitutional." In parentheses, "though a ban on foreign contributions would not be," unquote.

In another memo to Quinn, you expressed doubt that any constitutionally valid proposal to limit independent expenditures exist. So you said you were, quote, "wary of touting this notion to the president," unquote.

It seems to me that you were quite aware of the need to think critically and legally as well as politically, as you carried out your responsibilities. Can you say a little about the process of reviewing draft legislation in the counsel's office and the importance of developing legislation that is consistent with Supreme Court precedent as it exists at the time?

KAGAN: Senator Feingold, I tried my hardest, when I was in the -- when I worked in the Clinton administration, including as a lawyer, to provide good legal advice to the president. Now, it's -- it's a context in which one is dealing with law and policy and politics at the same time. That's the kind of institution it is. But it's very important for political figures and for the policy people to understand what the law requires and what the law permits and -- and for lawyers to give good advice on those topics, and -- and that's what I tried to do.

I should say that none of what I did in the Clinton White House, whether as a lawyer for the administration or as a policy person for the administration, really has much to do with what I would do as a judge.

I know that, when Chief Justice Roberts was here and he talked about a position that he had had in the -- the Justice Department, I think, or -- he separated out those two quite clearly, and I think he was right to do so.

But one is simply in a different position. At the same time as one is trying to provide good and independent legal advice to the president, one is also part of the president's team and doing so in that context, a very, very different kind of context from the context that I would be approaching cases as a judge.

But I will say that I think that my experience in the White House during the 1990s is valuable in one sense, which is that it taught me to very much respect the other branches of government. You know, I'm not a person whose experience is only and all about courts. I don't think courts are all there is in this government. I think that the political branches, Congress and the president are incredibly important actors and should be making most of the decisions in this country.

Courts do police these constitutional boundaries, do ensure that Congress and the president don't overstep their role, don't violate people's individual rights. But when it comes to policy, it ought to be courts that -- excuse me -- it ought to be Congress and the president that do the policy-making. And the courts ought to respect and ought to defer to that.

And I think that my experience in the executive branch and dealing a lot with Congress has made me very respectful of the president's role and Congress's role in our government.

FEINGOLD: I think that's an excellent answer, and I thank you for it.

I'm going to turn to something that requires a little more background now, a question that seems especially pertinent in the wake of the Deepwater Horizon disaster.

In 1989, the largest oil spill in American history decimated Prince William Sound, when we watched with horror as oil from the Exxon Valdez seeped into one of our most fragile ecosystems and caused tremendous damage. At the time, it was hard to imagine that we'd ever again see an oil spill of this magnitude or this kind of environmental damage. Tragically, we now know better.

Now, as was discussed by a number of senators yesterday, after extensive litigation, a jury in Anchorage awarded \$5 billion in punitive damages to the plaintiffs in the Exxon Valdez case, which, at the time, was less than Exxon profits in 1988 and is now less than the total profits Exxon took home in the first quarter of 2010.

Nineteen years after the jury awarded that amount, Alaskan landowners and commercial fishermen had still not received a single penny of that \$5 billion award and were hoping that the Supreme Court would finally vindicate their claims.

But instead of considering the need to punish Exxon and deter this sort of conduct in the future, the court manufactured a new rule and concluded that the award was excessive.

In reaching that decision, the court stated that Exxon and other corporations need to have "predictability, so they can look ahead and know what the stakes are when they choose one action or another."

Now, it's not hard to read this decision, especially in light of what's happened in the Gulf, as the Supreme Court giving a free pass to reckless corporations, even when our health and environment are at stake.

This is also one of many decisions over the last decade where the court has bent over backwards to find a way to protect corporate interests.

One of the judiciary's most important roles is to prevent powerful groups and corporations from running roughshod over the rights of individuals.

What did you think of the Exxon decision, and do you agree that the courts have an important role to play in protecting people who are injured by corporate misconduct?

KAGAN: Well, Senator Feingold, courts have an important role to play in protecting people under the law who -- who are injured by corporate misconduct or by any other.

This is an active area of the law, this question of what limits should be placed, if any, on punitive damage awards. And what the Supreme Court did in the Exxon case was really to decide it under its common law maritime powers. This was actually not a due process case, which some prior punitive damages cases have been.

Instead what the court decided, a majority of the court, was that there was an appropriate ratio of 1-1, I believe it was, for punitive damages, as compared with compensatory damages, as a matter of federal common law.

And my -- the relevance of that fact is that -- is that common law typically can be overturned by statute. And so that gives Congress an important role to play in this area. That would, of course, not be the case to the extent that any limits on punitive damages were a matter of the Constitution.

But as I understand the Exxon decision, the Exxon decision was based on common law power rather than a constitutional ruling.

FEINGOLD: Let me do something completely different. Last year I asked Justice Sotomayor how a Yankees fan could understand the everyday challenges of rural and small-town Americans in Wisconsin who root for the Brewers or Packers. I understand you're a Mets fan, which at least is -- is more the underdog over...

(LAUGHTER)

(CROSSTALK)

KAGAN: I don't know if it's more the underdog...

FEINGOLD: Well, traditionally, certainly.

(LAUGHTER)

So, first of all, if you're confirmed, that should make for an interesting dynamic on the court between the two of you. But I want to ask you this same question.

You grew up in Manhattan. You were dean of Harvard Law School, and you have lived in big cities most of your life. And there may be a perception on some people's part that you may not completely understand what many Americans are struggling with right now.

In fact, at a recent townhall meeting in Stevens Point, Wisconsin, one of my constituents asked why nominees to the Supreme Court always seem to be from the East Coast, when we have plenty of fine candidates in the Midwest?

How will you strive to understand the effects of the Supreme Court's decisions on the lives of millions of Americans who don't live on the East Coast or in our biggest cities?

KAGAN: Senator Feingold, does it count that I -- I lived in Chicago for some period of my life?

FEINGOLD: It helps.

(LAUGHTER)

Getting closer.

(LAUGHTER)

KAGAN: Senator Feingold, I -- I hope I've always been a person who's able to see beyond my own background and to listen hard to people, not only -- we've talked about listening hard to people of different political persuasions and views, but to try to learn from people who have different geographic backgrounds, different religious backgrounds, different racial backgrounds.

I mean, I think that this is something not only that makes a good judge, but makes a good human being, is to try to learn from people other than yourself. And I hope I've used the opportunities that life has provided me in my life to do that.

FEINGOLD: I mentioned my remarks on Monday of public confidence in the court is extremely important, just as it is crucial that the public has confidence in the integrity of its elected representatives. Lastly, there are news reports that the judge who overturned the Obama administration's moratorium on deepwater drilling may own stock in energy companies.

It's very damaging to the judiciary when a judge's neutrality can be questioned, which is why I think that obviously the ethical choices of a judge must be beyond reproach.

What do you think are the most important ethical questions facing the judiciary, and particularly the Supreme Court? And will you be an advocate within the court and the judiciary for addressing these issues forthrightly and strongly?

KAGAN: Well, certainly, Senator Feingold, what Chairman Leahy opened up with, which is the whole question of making sure that a judge is appropriate -- is recused from cases that a judge should be recused from. And there are obviously some hard calls there and some judgment calls. But taking those recusal rules very seriously is something that any judge should do. And I'm not speaking particularly about this case -- the case that you mentioned, which I know nothing about. But in general, I think judges should approach their recusal obligations with a great deal of seriousness and care.

FEINGOLD: And when we spoke in my office, you indicated that you had just recently learned that the Supreme Court is basically exempt from the code of judicial conduct and the rules that the Judicial Conference puts in place to apply it. And so you didn't really have an opinion about it yet. But now that you've had a chance to think about it, do you think, for example, that Supreme Court justices ought to be able to have contacts with parties of the case that other judges can't?

KAGAN: Senator Feingold, I really haven't thought about that issue since we talked about it. And I would want to speak with the people whom I hope will be my colleagues about it before I answer that question. I think it's an important question and one worthy of real consideration.

FEINGOLD: All right. I want to talk with you now about the issue of forced arbitration, which I've been working on for about a decade. More and more powerful economic interests are forcing consumers and employees to bring their disputes not to the courts, but to a parallel legal system where the rule of law barely applies and where the outcome I think is stacked against them.

A century ago, Congress passed the Federal Arbitration Act to allow parties who wanted to take their disputes to arbitration to enforce the results of the arbitration in court. In the last several decades, however, the Supreme Court has twisted this law to allow banks and mortgage companies, health care providers, big agribusinesses and others to enforce so-called "take it or leave it" contracts that force people to use arbitration even if they don't want to.

I think that's wrong and Congress needs to change it. And just this past week in the Rent-A-Center case, the court held that in most cases where a claim is made that enforcement of an arbitration clause would be unconscionable, it would be the arbitrator -- the arbitrator -- who gets to rule on that issue.

Do you understand why the Supreme Court's decisions in favor of powerful interests who want to force consumers and employees into arbitration against their will are so troubling to those who believe that our courts must continue to be available to enforce consumer protection, employment discrimination, and other laws written to protect the powerless from misconduct by the powerful?

KAGAN: Senator Feingold, I have not had an opportunity to read that case. It was not one that the solicitor general's office participated in. And I don't have a view of it or much knowledge about it.

I think that in this -- in that case, the Supreme Court was interpreting a congressional statute, and this is another of the areas where Congress does indeed get to state the rules. So to the extent Congress thinks the court got it wrong in that case or in any other regarding arbitration, I think it's appropriate, and the court would and should respect what Congress does.

FEINGOLD: With regard to financial regulation, I've heard a lot of anger from my constituents about financial institutions that have acted irresponsibly and then looked to the public for a safety net when things went wrong. That's in part why I opposed the Wall Street bailout. To take perhaps the most egregious example since the fall of 2008, the federal government provided approximately \$170 billion in bailout funding to the insurance giant, AIG.

But in contrast to the many workers in Wisconsin and others who faced a cut in their benefits and pensions because of the recession, AIG insisted incredibly that it was contractually obligated to pay roughly \$165 million in bonuses to its executive employees even as it was staying afloat with taxpayer money. I found it hard to believe that these bonuses were legally required.

So I was intrigued by a recent piece written by Noah Feldman, who I believe you hired when you were at Harvard. Feldman called for a new constitutional vision that would, quote, "focus on government's duty to protect the public, not the bankers who needed to be bailed out in the first place," unquote.

In light of the recent financial crisis, how should the courts evaluate the constitutionality of government regulation of big corporations and financial markets and other efforts to protect citizens and consumers from economic disaster?

KAGAN: Senator Feingold, it's a very broad question, and I guess I couldn't answer it except, you know, with respect to a particular case, a particular set of circumstances, a particular constitutional provision. I've not read Noah Feldman's article on this, so I can't talk about that. But I think, you know, the duty of the court is obviously to apply the Constitution, to apply the statutes in any case that comes before it, and to the extent that the Constitution or some particular statute made illegal some of the conduct that you're talking about, the duty of the court is to enforce that.

FEINGOLD: One last question. As you know, the appointment of so-called "czars" by the White House got a lot of attention last year, although there was certainly a political component to some of the criticism. I did think there was some legitimate matter that needed to be explored, particularly since this seems to be a trend over the last several administrations and I held a hearing on the topic.

You've written a lengthy and impressive law review article about the president's ability to direct and control action by administrative agencies, so I'm interested in your perspective. Do you think

there are any constitutional problems with presidents relying on non-Senate-confirmed czars to direct administrative policy, rather than the heads of administrative agencies? And how do you think Congress can exercise meaningful oversight over the czars operating within the White House when the White House counsel often takes the position that they should not testify before Congress about their activities?

KAGAN: Senator Feingold, I think that there are important considerations on both sides of this question. On the one hand, the president wants to have advisers in -- in appropriate positions -- advise he can trust, advice he can count upon. On the other hand, Congress has an important interest in accountability and making sure that the president and the president's actions can be held to account in -- in this institution.

I think that the balance between those two, when it comes to the president appointing certain people as czars or whatever you want to call them, probably is most appropriately determined by the political branches themselves, by the give and take, the back and forth between Congress and the president. Congress, of course, has many ways to express to the president that it doesn't like some set of actions that he's taking, including some appointments that he's made.

I suspect that a judicial case on that subject might be a last resort, rather than what seems to me the more common, and I think the more appropriate way of dealing with the conflict and a disagreement as to this matter, which is Congress and the president kind of battling it out as to way he should appoint people.

FEINGOLD: I thank you.

LEAHY: Thank you.

And that will be it for this morning. We'll come back within a few minutes after the vote begins at 2:15. I'll then recognize the next Republican senator in line and then go to the next Democratic senator.

I hope you get some lunch. Solicitor General, you're the one that's had to do all the work here this morning. I appreciate your testimony.

We stand in recess.

(RECESS)

LEAHY: I understand that the next person to question is Senator Grassley, who would -- he swapped places with somebody else.

And, Solicitor General Kagan, glad to have you back. I hope you at least had a chance to have -- have some lunch.

KAGAN: I did, Mr. Chairman. Thank you very much.

LEAHY: Good.

Senator Grassley?

GRASSLEY: Glad to be with you, Ms. Kagan. In an interview published May 2004, Metropolitan Corporate Council, you stated, quote, "Our courts are called upon to decide important matters, matters that often have great public impact. The attitude and views that a person brings to the bench make a difference in how they reached those decisions, so the Senate is right to take an interest in who these people are and what they believe," end quote.

Could you explain what attitudes and views you were talking about in the quote? What attitudes and views would you bring to the Supreme Court? And so I'll stop here. Thirdly, and most importantly, how will they make a difference in how you reach decisions? And "make a difference" is words out of your quote.

KAGAN: Thank you, Senator Grassley.

This really goes back to the -- the questions I started with Senator Leahy about. Senator Leahy asked me did I think that the Senate had an important role to play in this process.

And I said yes, it did, that the matter of confirming a Supreme Court justice is a highly significant one for the country and that the Senate has an important role to play and that different justices approach constitutional interpretation differently, approach statutory interpretation differently, and that the Senate has both an opportunity, but I think also a responsibility to try to delve into those matters and to try to figure out what stances, what approaches a person is likely to bring to the court.

And I tried to suggest to Senator Leahy earlier the kind of approaches I'd use with respect to constitutional interpretation, that I thought that a variety -- justices should appropriately look to a variety of sources, that I didn't have a grand theory with respect to constitutional interpretation, that I'm more pragmatic in my approach to constitutional interpretation, that I believe justices, depending on the particular provision, depending on the particular case, depending on the particular issue, should look to text, to history, to traditions, to precedent, certainly, and to the principles embodied in that precedent.

GRASSLEY: The attitudes and views that you have, how will they make a difference in how you will reach a decision?

KAGAN: Well, I think that approach to interpretation, to constitutional interpretation, is the one that I would bring to the court and is the one that -- that I would use on the court. And that's an approach that -- that might be different than some other people's, same -- some people have that approach. Some people have a different approach. And I think that those differences do matter.

GRASSLEY: OK. I'd like to go to the Second Amendment. In *Sandage v. United States* (ph), the D.C. Circuit Court of Appeals held that the Second Amendment only protects a collective right, not an individual right, upholding D.C.'s handgun ban and registration requirements.

A version of this law was later overturned in *Heller*. As the clerk to Justice Thurgood Marshall, you recommended against Supreme Court review. Your entire legal analysis was this, quote: "Petitioner's sole contention is that the District of Columbia's firearms statutes violate his constitutional right to keep and bear arms. I am not sympathetic," end of quote.

Why were you not sympathetic? Were you not sympathetic to that challenge because it was your belief that the Second Amendment protects collective, not individual right to keep and bear arms?

KAGAN: Senator -- Senator Grassley, I recommended that the court -- that Justice Marshall vote to deny certiorari in that case. This was 20 years before *Heller*. The state of the law was very different.

No court, not the Supreme Court and no appellate court, had held that the Second Amendment protected an individual right. And, indeed, none of the justices on the court at that time voted to take certiorari in that case.

It was by -- when -- when the Supreme Court took cert in *Heller*, a circuit court had held that the Second Amendment protected an individual right. There was a conflict in the circuits. It was ripe for Supreme Court review.

But at this time, no court had held that. It had long been thought, starting from the *Miller* case, that the Second Amendment did not protect such a right. And as I say, no justice voted to accept certiorari in that case.

Now, the *Heller* decision has marked a very fundamental moment in the court's jurisprudence with respect to the Second Amendment. And as I suggested to Senator Feinstein, there's no question that, going forward, *Heller* is the law, that it is entitled to all the precedent that any decision is entitled to. And that's true of -- of *McDonald*, as well, with respect to *McDonald*'s holding that the Second Amendment applies to the states, and that's what I would apply.

GRASSLEY: So then, if there had been -- the *Heller* case existed, you would have been sympathetic to the challenge, and so the words, "I'm not sympathetic," were related to what you thought the law was at that time?

KAGAN: It certainly was, Senator Grassley. It would have been an entirely different case had *Heller* existed prior to that certiorari petition.

GRASSLEY: I'd like to continue on Second Amendment. The Supreme Court held, as you know, in *Heller* that the Second Amendment included an individual right to possess firearms, not a collective right conditioned by participation of the militia.

Yesterday, the Supreme Court ruled in *McDonald* that the individual right recognized in *Heller* is applied to the states through the doctrine of incorporation via the 14th Amendment.

Do -- this is not a comment on the case, but do you personally believe that the Second Amendment includes an individual right to possess a firearm?

KAGAN: Well, I do think that *Heller* is the law going forward. I have not had myself the occasion to delve into the history that the courts dealt with in *Heller*, but I have absolutely no reason to think

that the court's analysis was incorrect in any way. I accept the court's analysis and will apply it going forward.

GRASSLEY: So whether you personally believe that Heller's -- or the right to bear arms is a collective or an individual right will have no bearing in the future, but you -- you don't want to tell us what your own personal belief is. That's kind of what I'm asking.

KAGAN: Well, my approach in these hearings has been not to grade cases, even if I thought I had the wherewithal to grade them, which I am not sure I do in Heller, just because the case is based so much on history which I've never had an occasion to look at.

I know that the -- the scholarship in this area has suggested that there's a very strong view that -- that there is an individual right under the Second Amendment. And certainly, Justice Scalia's opinion, which is a very thorough opinion for the court, is entitled to all the weight that any precedent has going forward.

GRASSLEY: The court said in Heller, quote, "It has always been" -- and I guess I would put emphasis upon the word "always" -- "It's always been widely understood that the Second Amendment, like the First and Fourth, codified a pre-existing right." Do you believe that the Second Amendment codified a pre-existing right? Or was it a right created by the Constitution?

KAGAN: Senator Grassley, I've -- I've never really considered that question, as to whether the Second Amendment right...

GRASSLEY: Well, it's basic to our Declaration of Independence that says we're endowed by our creator with certain -- certain individual rights, among them, you know, what it says, and we aren't endowed by our government. So the question here is, are we endowed by our Constitution with this right or did it exist before the Constitution existed?

KAGAN: Well, Senator Grassley, I do think that my responsibility would be to apply the Constitution as understood and previously applied by the court, and that means as understood and -- and interpreted by the court in Heller, and that's what I would do.

So I think that the -- the fundamental legal question would be whether -- that a case would present would be whether the Constitution guarantees an individual right to bear arms, and Heller held that it did, and that's good precedent going forward.

GRASSLEY: I know the Declaration of Independence is not the law of the land, but it does express a philosophy of why we went to war and why our country exists. And you understand, I hope, that if we're endowed by our government with certain rights, the government can take them away from us, whereas if we possess them ourselves and give them up from time to time to the government to exercise in our stead, then the government can't take away something that's inherently ours.

Do you believe that the Second Amendment right to bear arms is a fundamental right?

KAGAN: Senator Grassley, I think that that's what the court held in McDonald.

GRASSLEY: And you agree with it?

KAGAN: Good precedent going forward.

GRASSLEY: In response to questions from Senator Leahy and Feinstein, you stated that Heller and McDonald are now settled law. Do you agree with the decisions in Heller and McDonald as an individual, not -- not as a Supreme Court justice, but do you believe in them as a -- as a -- as settled law personally?

KAGAN: I -- I do think that those decisions are settled law and are entitled to all the weight that any precedent of the Supreme Court has.

GRASSLEY: Will you follow stare decisis and uphold Heller and McDonald?

KAGAN: I will follow stare decisis with respect to Heller and McDonald as I would with any case.

GRASSLEY: When you became dean of Harvard Law School, you spearheaded a sweeping overhaul of the academic curriculum. One change required students to take an international or comparative law course during their first year. You said, quote, "We're in a new world, and internationalization is an example. There is a recognition that a traditional curriculum does not provide some of what lawyers today need to know." I don't disagree with that statement.

You also said that the first year of law school is the foundation of legal education. Those four words are your words, because what students learn in that year, quote, "shapes their sense of what the law is, its scopes, its limits, and its possibilities."

I agree that the first year of law school is critical in framing a future lawyer. I also believe that taking an international law course is worthwhile. However, I am troubled by your failure to recognize the obvious importance of requiring a class in constitutional law.

I'm troubled by your decision to shape a student's understanding of the U.S. constitutional law, if any, see the eyes of foreign legal systems, some of which have little respect for the value and principles that we hold so dear in this country.

Surprisingly, constitutional law is not any first-year requirement at Harvard. In fact, it isn't even a requirement to graduate from law school, yet almost all the top law schools across the United States require their students to take a constitutional law course to graduate, and it's usually a first-year requirement.

When you said that, quote, "The traditional curriculum does not provide some of what lawyers today need to know," end of quote, are you saying that they don't need to know constitutional law? And why, then, is it more important for a law student to take an international law course than a course in U.S. constitutional law? In other words, which is more important -- our Constitution or other nations' constitutions and laws?

KAGAN: Our constitutional law is absolutely basic. When we were doing the curricular review of the law school some years ago, we did think about what should be in the first year. One of the questions we considered was whether to put some constitutional law in the first year.

Harvard has long taught constitutional law in the second and third year, since as far back as I can remember. I know that when I was a student it was taught in the second and third year.

We had a very serious discussion among our faculty as to whether to put constitutional law in the first year, as some schools do, although the two schools I've taught it, both Harvard and the University of Chicago, teach constitutional law in the second and third year.

And the reason for that is really a sense that students are better equipped to understand and to appreciate and to really delve into thoroughly all the subtleties and complexities of constitutional law issues in the second and third year, and that when you put it in the first year, it actually shortchanges constitutional law, because you can only give students a very small amount of what they really should know.

So both at Harvard and at the University of Chicago, it's taught in the second and third year, where it can be stretched out over a longer stretch of time where students can delve more deeply into it and also study it more broadly.

Now, we did decide -- when we were doing this curricular review, we did decide to put some more constitutional law in our first year. And the way we did that was through a course that focused on the governmental process, legislation, regulation. And that course is in part an introduction to constitutional law, because it focuses quite a lot on separation of powers issues.

So in fact, during that curricular review, although we decided -- and the constitutional law faculty felt extremely strongly about this -- that constitutional law primarily be kept in the upper years, where students can deal with it in a much more sophisticated and in-depth way. We did put some constitutional law into the first-year curriculum, specifically separation of powers issues, and of course that we devoted to the governmental process.

GRASSLEY: But in the process of your explanation, you're justifying that constitutional law is less of a foundation course than international law, are you not?

KAGAN: No. Senator Grassley, constitutional law is absolutely basic. But Harvard faculty has decided that it's actually best taught and most thoroughly taught at most broadly taught when it is done in the second and third years. Almost all students take a -- a very wide set of constitutional law issues, more than they could do in the first year at Harvard. So I think it's absolutely basic to our understanding of who we are as a people, and certainly to the knowledge of lawyers.

Now, I do think that international law is something that all law students today should be familiar with. I know that the students who graduate from Harvard, they go out, they do international litigation, they do international arbitrations, they do international business transactions, they do...

GRASSLEY: I said I didn't disagree with you on the importance of international law. Let me go on, please.

Should judges ever looked to foreign law for, quote-unquote, "good ideas?" Should they get inspiration for their decisions from foreign law?

KAGAN: Well, Senator Grassley, I -- I guess I'm in favor of good ideas coming from wherever you can get them, so in that sense I think for a judge to read a "Law Review" article or to read a book about legal issues or to read the decision of a state court, even though there's no binding effect of that state court, or to read the decision of a foreign court to the extent that you learn about how different people might approach and have thought about approaching legal issues.

But I don't think that foreign law should have independent precedential weight in any but a very, very narrow set of circumstances. So -- so I would draw a distinction between looking, wherever you can find them, for good ideas, for -- just to expand your knowledge of the way in which judges approach legal issues, but -- but making that very separate from using foreign law as -- as precedent or as independent weight.

Fundamentally, we have an American Constitution. Our Constitution is our own. It's -- it's the text that we have been handed down from generation to generation. It's the precedents that have developed over the course of the years. And except with respect to a very limited number of issues, that Constitution ought to -- the -- the fundamental sources of legal support and legal argument for that Constitution ought to be American.

GRASSLEY: Which foreign countries would you suggest we look to for good ideas?

KAGAN: Oh, Senator Grassley I -- I guess I would say again what I started with, which is you can look to good ideas wherever they come from. You know, there is a -- a brief that we filed recently in the Supreme Court. The solicitor general's office filed it. It regarded a Foreign Sovereign Immunities Act case.

And in the course of that brief, we noted a number of different foreign precedents regarding what other nations do with respect to the immunity of foreign officials. So, you know, that's the kind of way in which I think having an awareness of what other nations are doing, you know, might be -- might be useful.

GRASSLEY: Some judges, and maybe justices, have said that our influence in oral should be a factor that a judge consider in constitutional interpretation. So do you believe that our influence in oral should be a factor that judges consider in constitutional interpretation?

KAGAN: Senator Grassley, I think judges should let the president and the Congress worry about our influence on the world. I think that that's not something that -- that judges should pay much attention to -- should pay any attention to.

GRASSLEY: If confirmed, would you rely on your cite international foreign law when you decide cases?

KAGAN: Well, Senator Grassley, I guess I think it depends. There are some cases in which the citation of foreign law or international law might be appropriate. We spoke earlier -- I forget with which of the senators -- about the Hamdi opinion. Now, Hamdi opinion is one in which the question was how to interpret the authorization for the use of military force.

And Justice O'Connor in that case, one of the ways that she interpreted that statute was by asking about the law of war and what the law of war usually provides, what authorities the law of war provides. And that's a circumstance in which in order to interpret a statute giving the president various wartime powers, the court thought it appropriate to look to what the law of war generally provided.

So -- so there are a number of circumstances, I think -- I mean, another example would be suppose, you know, the -- the president has the power to recognize ambassadors under Article II. And there might be a question -- well, who counts as an ambassador? And one way to understand that question is -- is to look at what international law says about what who counts as an ambassador.

KAGAN: And one way to understand that question is to look at what international law says about who counts as an ambassador, and that might or might not be determinative, but it would be, you know, possibly something to think about and -- and -- and something to cite.

GRASSLEY: In your -- you wrote in your Oxford thesis, quote, "Judges will have goals, and because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid."

And then, in addition, quote, "And yet no court should make or justify its decisions solely by reference to demands of social justice. Decisions should be based upon legal principle and reason. They should appeal no less to our intellectual than to our ethical sense.

"If a court cannot justify a ruling in terms of legal principle, then the court should stay its hand: No judge should hand down a decision that cannot plausibly be grounded in principles referable to an accepted source of law.

"If, on the other hand, a court can justify a ruling in terms of legal principle, then the court must make every effort to do so. Judicial decisions must be based above all on law and reason."

Is it appropriate for judges to mold and steer the law?

KAGAN: Senator Grassley, all I can say about that paper is that it's dangerous to write papers about the law before you've spent a day in law school. So I wrote that paper when -- before I spent a day in law school. I was trying to think about whether to go to law school, and I decided to write a paper about law in order to figure out whether I interested in the subject.

And I discovered that I was interested in the subject, and I went to law school, where I found out that I might have been interested in the subject, but I didn't know much about the subject at the time.

And so I would -- I would -- I would just ask you to recognize that I didn't know a whole lot of law then, and there -- I didn't know a whole lot of law then.

(LAUGHTER)

GRASSLEY: You know, if I accept your answer, it's going to spoil a whole five minutes I had here.

(LAUGHTER)

But let me...

LEAHY: Chuck, Chuck, go ahead and accept it.

(LAUGHTER)

GRASSLEY: Let me enjoy it anyway, will you?

(LAUGHTER)

When you said that, quote, "No court should make or justify its decisions solely by reference to the demands of social justice," end of quote, are you saying that it is acceptable for a court to make and/or justify its decision based upon, quote, "the demands of social justice," end of quote? And if so, whose quote/unquote, "demands of justice" are you referring to?

KAGAN: Well, the first thing I'm going to do is just to ask that what I just said about that paper just be repeated for the record.

And now I'll say, no, I don't think it's -- it's -- it's appropriate to decide cases based on demands of social justice that are external to the law that ought to be applied to the case, whether that's constitutional law or statutory law.

GRASSLEY: OK. Well, let me leave that then and say that you've learned a lot by going to law school. I'm not sure I say that to very many people.

(LAUGHTER)

I'm not a lawyer, you know.

Let me go to one of your heroes, Barak.

Because you don't have any judicial experience, we have no concrete examples of how you decide cases, so we have to look elsewhere for clues as to what your judicial philosophy might be, including your judicial role models, because we have to assume that you agree with their judicial method.

I am troubled by the fact that you hold up Judge Barak to be a judicial role model. You've called him your, quote/unquote, "judicial hero." Judge Barak's judicial philosophy is undeniably activist and seen by many as a brazen abuse of power. He's been described as having, quote, "created a degree of judicial power undreamt of by most aggressive U.S. Supreme Court justice," end of quote. For example, Judge Barak believes that, quote, "a judge has a role in the legislative project," end of quote.

Will you look to Judge Barak's judicial method as a model for deciding cases?

KAGAN: I will not, Senator Grassley. I do admire Justice Barak, who is, of course -- was for many years the chief justice of the state of Israel. I do admire him. He is very often called the John

Marshall of the state of Israel because he was central in creating an independent judiciary for Israel and in ensuring that Israel, a young nation, a nation threatened from its very beginning in existential ways and a nation without a written constitution, he was central in ensuring that Israel, with all those kinds of liabilities, would become a very strong rule of law nation.

And that's why I admire Justice Barak, not for his particular judicial philosophy, not for any of his particular decisions. As you know, I don't think it's a secret, I am Jewish. The state of Israel has meant a lot to me and my family, and -- and I admire Justice Barak for what he's done for the state of Israel in ensuring an independent judiciary.

GRASSLEY: So then I suppose I can assume that you would disagree with his statement that, quote, "A judge has a role in the legislative project," end of quote.

KAGAN: I do disagree with that. I think that the legislative role and the judicial role are fundamentally different, and that judges owe a great deal of deference to legislatures and should not -- the legislative way of thinking is entirely different from the judicial way of thinking, and -- and judges should think of themselves, as I indicated before, only as policing the constitutional boundaries, only as ensuring that the legislature does not overstep its constitutional role by interfering with the states or -- or -- or by violating individual rights.

But certainly that judges should not be doing what the legislature ought to be doing, which is making the fundamental policy decisions for this nation.

GRASSLEY: One last statement he made, and I assume you would disagree with this as well. At Harvard Law he spoke, quote, "There are cases in which a judge carries out his role properly by ignoring the prevalent social consensus and becoming a flag bearer of new social consensus." Or would there be some time you might find that appropriate for the Supreme Court to take a leap like that?

KAGAN: Well, I'm not exactly sure what -- what he meant by that, but if he meant that the court should sort of make decisions that the American people are -- that more appropriately should make, you know, the sort of fundamental policy decisions of our society, I don't agree with that.

As I said, I was talking about Justice Barak and my admiration for Justice Barak comes from his important role of the state of Israel in ensuring an independent judiciary and most fundamentally in ensuring that Israel is this strong rule of law nation.

GRASSLEY: Last question. Do you agree with -- do you believe that Judge Barak endorses a philosophy of judicial restraint or judicial activism?

KAGAN: I think that Justice Barak's philosophy is so different from anything that we would use or would want to use in the United States.

For one thing, Israel is a country without any written constitution, a very fundamental difference from the United States.

So nothing about what I said about Justice Barak suggests in any way that I think that his ideas about the judge's role in constitutional interpretation should be transplanted to the United States.

GRASSLEY: Thank you.

LEAHY: I'll just put in the record what Justice Antonin Scalia said about, as he said, his good friend Judge Barak, when he gave him the American Association of Jewish Lawyers Pursuit of Justice Award, and Justice Scalia expressed his profound respect for the man. And what Judge Richard Posner, conservative luminary, described him by saying, if there were a Nobel Prize for law, Judge Barak would probably be an early recipient. Put that in there.

And I'd also note, on the question of looking at foreign law, I'll stick in the record what another nominee said to -- to us, and I think it was a question asked from the Republican side. There are other legal issues that come in which I think it is legitimate to look to foreign law. Let me give you some examples. That was Justice Alito.

LEAHY: And I just note that parenthetically every Republican voted for him.

GRASSLEY: Mr. Chairman, I can only assume that with your quick comeback, you have a copy of my notebook.

(LAUGHTER)

LEAHY: You probably wonder why there was a door to your shed that was open this morning.
(CROSSTALK)

SESSIONS (?): I respect the chairman's prerogative, but I don't think we should be in a situation where the chairman rebuts the questioning of each and every witness on this side. I think it kind of alters the dynamics.

I would just say with regards to Justice Scalia's comments about Mr. Barak, that that same comment, unlike Dean Kagan, he expressed a clear difference of philosophy about the activist vision that Justice Barak has for the role of a judge. Judge Posner said his -- that Judge Barak's activism exceeds anything un -- undreamed of by the most activist American judge, and I think you misquoted and failed to quote completely the nature of those two people's comments.

And there is a raging debate in this country, and no one denies it, over the extent to which foreign law can be cited to define the Constitution and laws of this country.

(CROSSTALK)

SESSIONS (?): And I would -- I would assume that this nominee, from her statements, would be on the side of Justice Ginsburg who favors that.

(CROSSTALK)

LEAHY: I'll -- I'll reclaim -- we'll have plenty of time to debate this. As you know, I gave Senator Grassley extra time, and then I responded with an equal amount of time, and we will put into the record, and of course I would I yield to anybody who wants to put something in the record just exactly what Justice Alito said and Judge Posner said and Judge Scalia said.

KAGAN: Senator Leahy, if I might just make one last point. I made these remarks about Justice Barak when he came to Harvard Law school to give a speech. One of the things that I did as dean of law school was I gave introductions. I gave introductions to many, many people. If any of you had come to Harvard Law School, I would have given you a great introduction, too.

(LAUGHTER)

LEAHY: Thank you.

And with that, I'll yield to...

(CROSSTALK)

LEAHY: You see, Senator Grassley, you've got something to look forward to yet.

(LAUGHTER)

Senator Specter, go ahead.

SPECTER: Mr. Chairman, thank you.

Are you and Senator Sessions on your second or third round? Some of us haven't had a first round.

SESSIONS (?): Just trying to be worthy of your effective role as ranking member.

SPECTER: May we start at 30 minutes on my clock without Senator Sessions' interjection?

(LAUGHTER)

SPECTER: Madam Solicitor General, I begin with concern for separation of powers which is the foundation of the Constitution, and the concerns I have for what the Supreme Court has done really in having a consolidation of power -- a lot of it going to the court, a lot of it going to the executive branch, and it's all coming from the traditional power of Congress.

Before I move into that area, I want to take up a couple of points. Senator Sessions has raised the issue about your being a progressive, a legal progressive. When he was doing that this morning, I was thinking about the Supreme Court's decision yesterday incorporating the Second Amendment into the due process clause of the 14th Amendment, and remember how many objections were raised to the activist liberal Warren court for doing that.

I was a prosecutor at the time and the law changed. Constitutional law changed with a (inaudible) in '61 and Gideon in '63 and Rand (ph) in '66. And now we have the five conservatives being progressives or activists.

I was intrigued by Senator Hatch's questioning you on the Citizens United case, really an extraordinary case characterized by what Justice Stevens had to say in dissent. You have Congress constructing a detailed record, 100,000 pages, and Congress has structured McCain-Feingold based upon the standards set forth by the Supreme Court in *Austin v. Michigan Chamber of Commerce*.

And then as Justice Stevens noted, the court pulled the rug out from Congress, affirming the constitutionality where -- that had been in effect for 100 years. And as Justice Stevens concluded, showing, quote, "great disrespect for a coequal branch."

I will try to make my questions as pointed as I can, and to the extent you can answer them briefly, I'd appreciate it. We don't have a whole lot of time.

What is your thinking on disrespect for the Congress when we take a Supreme Court decision and we structure a law based on those standards with the customary deference due Congress on fact finding? Isn't that really what Justice Stevens calls is, disrespect?

KAGAN: Well, Senator Specter, as you know, I argued that case, as you know. I filed briefs on behalf of the United States in that case. And in those briefs, the government made a similar kind of argument, that great deference was due to -- to Congress in its -- in the creation of the quite voluminous...

SPECTER: Ms. Kagan, I know what you said. You've talked about that a great deal. My question is very pointed: Wasn't that disrespectful?

KAGAN: Senator Specter, as I suggested before, when I walked up to that podium in Citizens United, I thought we had extremely strong arguments. I was acting as an advocate, of course, but I -- I thought we had very strong arguments.

SPECTER: Ms. Kagan, I'm going to move on. I know all of that. The point that I am trying to find out from you is what deference you would show to congressional fact-finding.

Let me move on.

KAGAN: Well, may I -- may I try again? Because I think that the answer to that is great deference to congressional fact-finding.

SPECTER: Well, was it disrespectful or not?

KAGAN: Well, again, I don't want to characterize what the Supreme Court did.

SPECTER: Well, I want to move on. If you don't want to characterize, I want to ask my next question.

In the U.S. v. Morrison involving the issue of violence against women, we had a mountain of evidence assembled, as Justice Souter pointed out in dissent, and the court rejected congressional findings because of our, quote, "method of reasoning." You haven't crossed the street to the Supreme Court yet, but do you think that there is some unique endowment when nominees leave this room and walk across the street to have a method of reasoning which is superior to congressional method of reasoning, so that we can -- the court can disregard voluminous records because of our method of reasoning?

KAGAN: Well, to the contrary, Senator Specter, I think it's extremely important for judges to realize that there is a kind of reasoning and a kind of development of factual material more particularly that goes on in Congress.

SPECTER: Then you disagree with Chief Justice Rehnquist?

KAGAN: I -- I think that it's -- that it's very important for the courts to defer to congressional fact finding, understanding that the courts have no ability to do fact finding, are not -- would not legitimately, could not legitimately do fact finding.

SPECTER: Well, I know all of that, but what do you think of our method of reasoning?

KAGAN: As I -- as I said earlier, Senator Specter, I have enormous respect for the legislative process, and part of that respect comes from working in the White House and -- and working with Congress on a great many pieces of legislation.

SPECTER: I'm going to move on to my next question.

Justice Scalia in Lane attacked the standard of congruence and proportionality, saying that this court is acting as Congress' taskmaster.

SPECTER: The court is checking on congressional homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional.

I've picked out three instances: Citizens United where Justice Stevens says great disrespect; and the attack by Rehnquist on our method of reasoning; and Scalia talking about proportionality and congruence.

And that brings me to the question for you, where you have been very explicit in the now-famous University of Chicago Law Review article about dealing with substantive issues.

We had the standard for determining constitutionality under the Commerce Clause from Maryland v. Wirtz, 1968; Justice Harlan, who established that standard, quote, "where we find that

the legislators have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

In the City of Boerne case, 1997, the court pulled out of thin air a new test. And the test is whether the legislation is proportionate and congruent. And that is the test which Justice Scalia so roundly criticized, saying it was flabby, that it was an excuse for a judicial legislation.

Now, would you take Harlan's test as opposed to the congruence and proportionality test?

KAGAN: Senator Specter, Justice Scalia is not the only person who has been critical of the test. A number of people have noted that the test -- which is, of course, a test relating to Congress' power to legislate under Section 5 of the 14th Amendment -- that the test has led to some apparently inconsistent results in different cases. So you have a case like Garrett on the one hand and a case like Tennessee v. Lane on the other

SPECTER: I know those cases very well: 5-4, O'Connor went the other way, but they both used proportionate and congruent.

What I want to know from you is whether you think that is an appropriate standard to replace the rational basis test of Wirtz?

KAGAN: Well, it is the standard of the court right now. It is precedent, and it is entitled to weight as precedent.

Now as you very well know, Senator Specter, there are times when the court decides that precedent is unworkable. It just -- it produces a set of chaotic results.

SPECTER: What was unworkable about the Wirtz test for a reasonable basis contrasted with congruent and proportional, which nobody understands?

KAGAN: Yes, I wasn't -- I wasn't suggesting that the Wirtz test was unworkable. I think that the question going forward -- and it is a question, I'm not stating any conclusion on it. But I think that something that Justice Scalia and others are thinking about is whether the congruent and proportionality test is workable or whether it produces such chaotic results and gives...

(CROSSTALK)

SPECTER: Do you think it is workable?

KAGAN: Senator Specter, I've -- I've not really delved into the question in the way I would want to as a judge -- reading all the briefs, listening to the arguments, thinking through the issues from both sides. But I do know that the court needs -- excuse me -- that Congress needs very clear guidance in this area. It's not fair to Congress to keep on moving the goal posts. It's not fair to say, "Oh, well, you know, if you do this, this time, it will be OK, but if you do that the next time it won't."

So I do think...

SPECTER: Ms. Kagan, this is an issue we discussed weeks ago. This is an issue I raised in a series of letters -- which I'll put into the record. This is a standard which has been around for a long time.

And you know a lot of law. Senator Grassley established that. Is it a satisfactory test?

Well, let me move on to another question. I don't think I'm making too much progress.

One of the grave concerns which has risen out of the -- out of recent confirmation proceedings with Chief Justice Roberts and Justice Alito -- and I've spoken about this subject extensively on the floor, citing how emphatic Chief Justice Roberts and Justice Alito were on deferring to Congress. "It's a legislative function. It's not a judicial function," they say. "If you engage in fact-finding, the court does that, the court is transgressing into the congressional area."

And then you have a case like Citizens United and others, and you have the declarations by the chief justice of modesty. You've adopted that standard. His more emphatic standard was not to jolt the system. Is there any way you could look at Citizens United other than as being a tremendous jolt to the system?

KAGAN: Well, Senator Specter, again, this is one that as an advocate I've taken a strong view on, which is that it was a jolt to the system. That there were -- there was a great deal of reliance interests involved, that many states had passed pieces of legislation in reliance upon Austin. That Congress had passed legislation after accumulating a voluminous record...

(CROSSTALK)

SPECTER: Ms. Kagan, you have said that many times today about your advocacy in the case. But what I want to know is, as a prospective justice, do you consider it a jolt to the system?

KAGAN: Senator Specter, it's a little bit difficult to take off the advocate's hat and put on the judge's hat. And one of the things that I think is important is that I appreciate the difference between the two. And I have been an advocate with respect to Citizens United, and that's the way I came to the case, the way I approached the case. I hope that I did a good and effective job in it. And I believed what I was saying.

But it's a different role and it's a different thought process, and the role and the thought process that one would use as a judge.

SPECTER: Well, what I'm interested is what should (inaudible) as a judge. But let me move on again.

There's a lot of concern in the Senate about the value of these hearings. When we have the kinds of declarations at that table, your predecessor and nominees on deference to Congress, and then there's none given, not to jolt the system and be modest, and there is a 180-degree U-turn. And we wonder what we can do about it.

Judicial independence is the bulwark of this republic. Judicial independence gives us the rule of law, and it is our most highly prized value. While the Congress and the executive branch fumbled on segregation for decades, really centuries, the court came along and acted on the subject in a progressive way, a very progressive way and a very activist way. Nobody challenges it on either side of the aisle today.

So we really have the highest respect for judicial independence.

But what do we do when we confirm nominees and they don't follow through on very flat commitments?

This is not just my view. The view of Richard Posner is very, very tough -- in his book "How Judges Think." And this is what he has to say about the subject I'm addressing, quote: "Less than two years after his confirmation," referring to Chief Justice Roberts, "he demonstrated by his judicial votes and opinions that he aspires to make changes in significant areas of constitutional law.

"The tension between what he said at his confirmation hearing and what he is doing as a justice is a blow to Roberts' reputation for candor and further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings," closed quote.

SPECTER: Now, we're trying to raise the level of that currency (ph). I don't believe you want to make a comment about that, but if you do, you're welcome to.

KAGAN: Senator Specter, I -- I assume the good faith of everybody who sits in this chair. And I -- I -- there's no reason in my mind to think otherwise.

SPECTER: Madam Solicitor General, I agree with you as to good faith. And raising these issues in a series of speeches on the floor, I have explicitly said that I'm not challenging the good faith of Chief Justice Roberts or Justice Alito.

And I understand the difference between sitting at that witness box and deciding a case in controversy that comes before the court, but that still leaves us with a problem.

The best answer that a group of senators -- and we talk about this with some frequency -- can come up with is to put some sunlight on the court. As I said in my opening statement, the disinfectant that Brandeis talked about, sunlight, the best disinfectant. Well, it's not quite a disinfectant, but I think if the public understood what was happening, there would be a strong temptation to stand by what had been said in these confirmation hearings.

And I was really glad to hear you say, in response to Senator Kohl's questions, that you favor televising the Supreme Court. I think we may be getting closer.

I've been at it for more than a decade with a whole series of bills. And recently, the Judiciary Committee voted out a bill to televise the Supreme Court 13-6, and we did it a couple of years ago 12-6. And I know it's going to be something the court is going to have to come to, perhaps on its own, but the public views are increasing.

A poll which was released by C-SPAN just yesterday shows that 63 percent of the American people favor televising the court. And among the 37 percent who opposed, when they were told that people can only be in the Supreme Court chamber for about three minutes, accommodates only a couple hundred people, 60 percent of those 37 percent thought the court should be televised, which brings the total to about 85 percent.

I know we don't run the court by public opinion polls, but isn't that fairly weighty as to what the -- the American people would like to -- like to know?

We talk about a living Constitution and about the Constitution expressing the changing values of our society, as Cardozo said so eloquently in *Palko*. If the people of this country knew that the court was deciding all of the cutting-edge questions -- a woman's right to choose, who lives, death penalty cases for juvenile, who dies, affirmative action, who gets into college, freedom of speech and religion -- the American people responded in a poll to *Citizens United*, 85 percent thought it was a terrible decision, 95 percent thought that corporations made contributions that influence legislators.

One of the great problems of the skepticism of the American people about Congress -- and is it heavy out there -- it's open season on Congress because of so much of what people think about.

Well, coming back to the court, wouldn't it be -- well, you've already said you're in favor of televising the court, but wouldn't televising the court and information as to what the court does have an impact on the values which are reflected in the American people?

KAGAN: I do think, Senator Specter, it would be a good thing from many perspectives. And I would hope to -- if I'm fortunate enough to be confirmed -- to engage with the other Supreme Court justices about that question.

I think it's -- it's always a good thing when people understand more about government, rather than less. And certainly, the Supreme Court is an important institution and one that the American citizenry has every right to -- to -- to know about and understand.

And I also think that it would be a good thing for the court itself, that that greater understanding of the court, I think, would redound to its own advantage. So I think, from all perspectives, televising would be a good idea.

And now I realize that some people -- some justices may have views to the contrary, and I would want to hear those views and to think about those views, but -- but -- but that's sort of my going-in thought, which...

SPECTER: I will put into the record what the justices have had to say. I've questioned almost everybody about this subject, and I've had the opportunity to question all of the people on the court now.

But there's a lot -- there are a lot of those who have been favorably disposed to it -- or at least have acknowledged its inevitability -- and remind them that they all appeared on television this year on C-SPAN, and most of them -- many of them have appeared over the years selling books and being in a variety of situations.

KAGAN: It means I'd have to get my hair done more often, Senator Specter.

(LAUGHTER)

SPECTER: Let me commend you on...

(LAUGHTER)

Let me commend you on that last comment.

(LAUGHTER)

And I say that seriously. You have shown a really admirable sense of humor, and I think that is really important. And as Senator Schumer said yesterday, we're looking for somebody who can moderate the court, and a little humor would do them a lot of good.

In the case of *Richmond Newspapers v. Virginia*, the Supreme Court said in -- that a public trial belongs not only to the accused, but to the public and press, as well. People now acquire information on court procedures chiefly through the print and electronic media. That's a 1980 decision which upheld a newspaper's rights to be in court and observe a trial.

Isn't that some pretty solid precedent, to say that as a legal -- a matter of law, the court ought to have television to have public access, because that's the way most people get their information these days?

KAGAN: That's very interesting, Senator Specter. I had never considered the relevance of that case to the -- the televising question, but I think that the -- certainly the principles in that case, the values in that case are about the public's ability to know how our governmental institutions work, which is what's critical to this issue, as well.

SPECTER: Let me move on to another subject which I consider to be of great importance, and that is the agenda of the court, the number of cases the court hears.

In 1886, the court decided 451 cases. In 1987, a little more than 20 years ago, 146 cases; in 2006, 67; 2007, 75; 2008 -- or 2006, 68; 2007, 67; 2008, 75; 2009, finishing yesterday, 73.

The court leaves a lot of circuit splits unresolved. The court does not hear a great many critical cases. And I discussed this with you in our meeting several weeks ago and wrote you about it, as well, and that is the case involving the terrorist surveillance program.

On the Foreign Intelligence Surveillance Act, which arguably poses the sharpest conflict between the Congress legislating FISA and the president asserting Article II powers, a federal court in Detroit found the terrorist surveillance program unconstitutional. The Sixth Circuit ducked it 2-1 with a very strong dissent on standing grounds, which is traditionally a way of avoiding a case, and the Supreme Court denied cert.

Congress has the authority to tell the court what cases to take. We've legislated giving you discretionary authority, but in cases, many cases, illustratively, the flag-burning case and McCain-Feingold and Federal Labor Standards Act, we directed the court to -- to hear the case.

SPECTER: So I think that it's fair to ask if -- what you would have done, not how you would decide that case, but whether you would -- would take the case. Had you been on the Supreme Court, would you have voted the grant cert in the Terrorist Surveillance Program case?

KAGAN: Well, Senator Specter, if I might, and just to your first point, which was the point about the courts defining docket, I do generally agree with that. I clerked on the court in -- in 1987, which was pretty much at the high point of -- of what the court was -- was doing, about 140 cases a year.

And it is a -- a bit of a mystery why it's declined so precipitously. And -- and I do agree with you that there -- there do seem to be many circuit conflicts and other matters of -- of vital national significance...

SPECTER: The other issue I raised was much more important.

KAGAN: OK.

SPECTER: And there are only two minutes left...

KAGAN: OK.

SPECTER: ... now.

KAGAN: Senator Specter, the -- the issue about the TSP and the constitutionality of the TSP is, I think, one of the kinds of issues I -- I previously set out three categories where the court might grant cert, one which is circuit conflicts, one which is the invalidation of an act of Congress, and the third is just a issue of -- of some vital national importance.

In a -- in a case where the executive branch is determined -- or -- or is alleged -- excuse me -- is alleged to be violating some congressional command, it is, I think, one of the kinds of cases that the court typically should take.

Now, there is in this case the complexity that there is a potential jurisdictional bar. And, of course, the court typically decided...

SPECTER: What -- what jurisdictional bar?

KAGAN: Well, the question whether somebody has standing. So often, the court will decline to take a case when there is a significant jurisdictional issue, because the court will think, well, if we take this case, we might hold that we don't have jurisdiction, and we'll never...

SPECTER: What if you take the case and say they don't have jurisdiction?

KAGAN: Yes. You're -- you're exactly right. And -- and I'm just suggesting that that's often a reason why the court doesn't take a case. If it doesn't know...

SPECTER: I don't care what's often a reason. Here we have a specific case. You've had a lot of notice. It's in concrete. Would you have voted a grant cert?

KAGAN: Senator Specter, I can -- I can just tell you there was this jurisdictional issue. Now, the jurisdictional issue itself was an important one. It was an important one, because how -- how is a person going to know whether the person had been surveilled...

SPECTER: Sixth Circuit decided there was no standing after they heard the case. Well, my time is almost up -- 10 seconds, and I was 13 seconds over last time. There are a couple of other cases -- the holocaust survivors and the 9/11 survivors of victims, which I'll come back to when I have a green light.

LEAHY: Thank you very much, Senator Specter.
And Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

LEAHY: And then we will, just for planning purposes, Senator Graham, we'll go to you.

GRAHAM: OK.

LEAHY: Then we'll go to Senator Schumer, and then we'll take a short break. Does that work for...

KAGAN: That's good.

LEAHY: OK.

Senator Graham's all yours.

GRAHAM: Thank you.

So far have the hearings been what you thought they would be?

LEAHY: And more.

KAGAN: I'm not sure I had -- I'm not sure I exactly pictured it so.

GRAHAM: Let's try to go back in time and say you're watching these hearings and you are critical of the way the Senate conducted these hearings.

(LAUGHTER)

Are we improving or going backward?

(LAUGHTER)

And are you doing your part?

(LAUGHTER)

KAGAN: I think that you've been exercising your constitutional responsibilities extremely well.

(LAUGHTER)

GRAHAM: So it's all those other guys that suck, not us, right?

(LAUGHTER)

KAGAN: I don't think I'm...

GRAHAM: And there's all those other witnesses that were too cagey. All right. Fair enough.

Now, do you know Greg Craig?

KAGAN: I would say one thing, Senator Graham, which is it just feels a lot different from here than it felt from back there.

GRAHAM: I -- I bet it does. And it feels a lot different when you're the nominee, too, doesn't it? And if it didn't, I'd really be worried about you.

You know Greg Craig.

KAGAN: I do.

GRAHAM: Who is he?

KAGAN: He was previously the counsel to the president.

GRAHAM: Do you know him well? Pretty well?

KAGAN: You know, OK, yes. Well, he's a good guy.

GRAHAM: I'm not trying to trick you.

KAGAN: Yes.

GRAHAM: I mean, I don't...

(LAUGHTER)

GRAHAM: ... I don't have anything on Greg I can find. He said on May 16th that you -- that you are largely a progressive in the mold of Obama himself. Do you agree with that?

KAGAN: Senator Graham, you know, in terms of my political views, I've been a Democrat all my life. I've worked for two Democratic presidents. And those are, you know, that's -- that's what my political views are.

GRAHAM: And would you consider them, your political views, progressive?

KAGAN: My political views are -- are generally progressive, generally...

GRAHAM: Compared to mine for sure, right?

(LAUGHTER)

Yes, OK, that's fine. I mean, there's no harm in that, and that makes the hearings a little more interesting. I would be shocked if President Obama did not pick someone that shared his general view of the law and life, and so elections have consequences. Do you agree with that? Elections do have consequences.

KAGAN: It would be hard to disagree that elections have consequences.

GRAHAM: Right. And one of the -- and one of the consequences is a president gets to fill a nomination for Supreme Court. That's the power the president has, right?

KAGAN: Yes, sir.

GRAHAM: So would be OK from your point of view if a conservative president picked someone in the mold of a conservative person.

KAGAN: I would expect that.

GRAHAM: There we go. Good. We'll remember that. OK. We may have a chance to bring those words back.

Do you know Miguel LaStrada?

KAGAN: I do.

GRAHAM: How do you know him?

KAGAN: So Miguel and I classmates at Harvard Law School, but we were more than classmates at Harvard Law School. Harvard Law School has a way of -- has required seating in the first year, and Miguel and I were quite...

GRAHAM: Trust me. I don't know, because I could have never gotten there, but I trust you. OK.

KAGAN: Miguel and I were required to sit next to each other in every single class in the first year. And I can tell you Miguel takes extraordinary notes. So it's great. Every time you miss something in class, you could just kind of look over and -- but that's how I know Miguel. And we've been good friends ever since.

GRAHAM: What's your general opinion of his legal abilities and his character?

KAGAN: I think he is a great lawyer and a great human being.

GRAHAM: He wrote a letter on your behalf. Have you had a chance to read it?

KAGAN: I did.

GRAHAM: Can I read part of it?

"I write in support of Elena Kagan's confirmation as associate justice of the Supreme Court of the United States. I've known Elena for 27 years. We met its first-year law students at Harvard, where we were assigned seats next to each other" -- so you're consistent -- "for all our classes. We were later colleagues as editors of the 'Law Review' and as law clerks to different Supreme Court justices, and we have been friends since.

"Elena possesses a formidable intellect, an exemplary temperament, and the rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments. Elena also -- would also bring to the court a wealth of experience at the highest levels of our government and of academics, including teaching at the University of Chicago, serving as a dean of the Harvard Law School and experience at the White House as current solicitor general of the United States.

If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we will have reached were no capable person will readily accept a nomination for judicial service."

What do you think about those comments?

KAGAN: Senator Graham, I think that those comments reflect what an extraordinary human being Miguel LaStrada is. And I was deeply touched when I read that letter, deeply grateful to him, of course, and all of the nice things that he said about me I would say back about him double.

GRAHAM: Well, I'm going to give you that chance, because Miguel LaStrada, as most people know -- maybe not everyone -- was nominated by President Bush to the court, and he never made it. I think it's one of the great tragedies for the country that he was never able to sit on an appellate court, but that's the past. And I do think it reflects well of him that he would say such things about you. And quite frankly, I think it reflects well of you that you would say such things about him.

In your opinion, Ms. Kagan, is he qualified to sit as an appellate judge?

KAGAN: He's qualified to sit as an appellate judge. He's qualified to sit as a Supreme Court justice.

GRAHAM: Well, your stock really went up with me.

GRAHAM: So what I would like you to do since you might one day be on the court yourself, is to, if you don't mind, at my request, write a letter to me, short, as long as you like it, about Miguel Estrada.

Would you be willing to do that the next couple of days?

KAGAN: I would be pleased to do that, Senator Graham.

GRAHAM: Thank you.

Now, let's talk about the war. As solicitor general of the United States, you represent the United States government before the Supreme Court, right?

KAGAN: I do.

GRAHAM: OK. Let's shift gears here. And you had to get confirmed before this body for that job. Do you remember that confirmation process?

KAGAN: I do.

GRAHAM: Do you remember me?

KAGAN: I do remember you.

GRAHAM: OK, good.

Do you remember when I asked you, "Are we at war?" and you said...

KAGAN: "Yes."

GRAHAM: OK.

Now, that is a bold statement to make, but an accurate statement. What does it mean -- who are we at war with and what does that mean in terms of this nation's legal policy?

KAGAN: Well, we're at war with Al Qaida and the Taliban, and under the AUMF the president has a wide range of authorities with respect to those groups.

GRAHAM: Now, under domestic criminal law, as we know it today, is there any provisions in our domestic criminal law that would allow you to hold someone indefinitely without trial?

KAGAN: Not that I know of, Senator Graham.

GRAHAM: And quite frankly, there shouldn't be, should there?

KAGAN: No, sir.

GRAHAM: Now under the law of armed...

KAGAN: I feel as though we're doing this again.

GRAHAM: We are.

KAGAN: We're sort doing an instant replay.

GRAHAM: Yes, yes, yes, we're going to do this again and I hope we get the same answers. That will help you a lot if we do.

(LAUGHTER)

And if we don't, we'll have a problem.

Under the law of armed conflict, is it permissible to hold an enemy combatant as long as the holding force deems them to be dangerous?

KAGAN: Under the traditional law of war it is permissible to hold an enemy combatant until the end of hostilities.

GRAHAM: Right.

KAGAN: And the idea behind that is that the enemy combatant not be enabled to return to the battlefield.

GRAHAM: That's a -- that's a good summary. The problem with this war is there will never be a definable end to hostilities, will there?

KAGAN: That is exactly the problem, Senator Graham. And Hamdi very briefly discussed this problem, the court in Hamdi, suggesting that perhaps if this war was so different from the traditional law of war that there might need to be alternative procedures to put in place.

For example, one could imagine a system in which, because of the duration of this war, it was necessary to ensure the enemy combatants' continuing dangerousness. That is a question that I think has not been answered by the court.

GRAHAM: Do you believe it would serve this country well if the Congress tried to work with the executive branch to provide answers to that question and others?

KAGAN: Well, Senator Graham, let me take the question and make it into a legal question, because I think it's directly relevant under the Youngstown analysis whether Congress and the president do work together.

GRAHAM: When the two are together, the courts find more power, not less, right?

KAGAN: That is correct.

GRAHAM: OK. Now, you're still solicitor general of the United States. From that point of view, would you urge this Congress to work with the executive branch to find -- to create statutes to help the courts better answer these questions?

KAGAN: Well, Senator Graham, I think I don't want to talk as solicitor general as to legal policy here.

GRAHAM: OK.

KAGAN: But I will say...

GRAHAM: Go ahead.

KAGAN: ... as to the legal matter, that it makes a difference whether the Congress and the president work together, that courts should take note of that, that courts should -- when that occurs, the action is at -- ought to be given the most deference and that there's a reason for that.

GRAHAM: Right.

KAGAN: It's because the courts are basically saying Congress and the president have come together, Congress and the president have agreed upon a policy jointly, and there should be deference in those circumstances.

GRAHAM: Are you familiar with Judge Lamberth and Judge Hogan?

KAGAN: I don't know either of them. I know who they are.

GRAHAM: Fair enough. They're D.C. judges, Federal District Court judges who are hearing habeas appeals from Gitmo detainees. And I'll provide you some of the comments they've made.

"It is unfortunate," according to Judge Hogan, "It is unfortunate, in my view, that the legislative branch of the government and the executive branch have not moved more strongly to provide uniform clear rules and laws for handling these cases." And I've got other quotes that I will provide you.

What I'm trying to do here is lay the foundation for the idea that our laws that exist today do not recognize the dilemma the country faces. The administration has determined that 48 people held at Gitmo are too dangerous to let go but are not going to be subject to normal criminal proceedings.

In other words, we believe the evidence suggests they're members of Al Qaida, they've all gone before a habeas judge, and the judge agreed, but they're never going to be tried in a traditional fashion.

Is the administration's decision, in your opinion, consistent with the power under the law of war to do that?

KAGAN: Well, as solicitor general, Senator Graham, I have argued the position...

GRAHAM: And I think very well...

KAGAN: ... that this is fully legal.

GRAHAM: ... very well. You have argued for the proposition that this president and all future presidents has the ability to detain an enemy combatant with sufficient process if the executive branch believes that they are dangerous and not require them to go through a normal criminal trial. And what we have to do is find out what that process would be, this hybrid system.

You argued against expanding habeas rights to Bagram detainees held in Afghanistan, is that correct?

KAGAN: I did, Senator Graham.

GRAHAM: As a matter of fact, you won.

KAGAN: In the...

(CROSSTALK)

GRAHAM: Initially.

KAGAN: ... circuit.

GRAHAM: And you probably won't be able to hear that case if it comes to the Supreme Court, will you?

KAGAN: Well, that's correct. And the -- and the reason...

GRAHAM: Well, that's good, because we can talk openly about it.

(LAUGHTER)

KAGAN: I mean, if I -- if I could -- if I could just say, in general the solicitor general only signs her name to briefs in the Supreme Court; authorizes appeal but does not sign appellate briefs. But I determined that I should be the counsel of record on that brief because I thought that the United

States' interests were so strong in that case based on what the Department of Defense told our office about...

GRAHAM: Well, I want -- right -- I want every conservative legal scholar and commentator to know that you did an excellent job, in my view, of representing the United States when it came to that case.

And you said previously that the first person you have to convince when you make -- when you submit a brief or take a case on is yourself, is that correct?

KAGAN: Well, I said that in reference to the cases that I argued specifically. Of course, when I -- when I write briefs, I write from -- or when I sign briefs, when I'm counsel of record on briefs, I'm taking the position of the United States, that I'm representing the position that I believe and that our office believes is most consistent with the long-term interests of the United States government.

GRAHAM: Have you convinced yourself, as well as representing the United States government, it would be a disaster for the war effort if federal judges could intervene and require the release of people in detention in Afghanistan under military control?

KAGAN: Senator Graham, I chose to put my name on that brief, as I said, which is a very, very rare thing in the appellate courts, because I believed that there were very significant United States...
(CROSSTALK)

GRAHAM: Well, let me read a quote.

"The federal court should not become the vehicle by which the executive is forced to choose between two intolerable options: submitting to intrusive and harmful discovery or releasing a dangerous detainee."

Do you stand by that statement?

KAGAN: Senator Graham, can I ask whether that statement comes from that brief?

GRAHAM: Yes, it does.

(LAUGHTER)

KAGAN: No, I -- I mean, that statement is my best understanding of the very significant interests of the United States government in that case which we tried forcefully to present to the court. And as you said before, the D.C. circuit, a very mixed panel of the D.C. Circuit...

GRAHAM: Right.

KAGAN: ... upheld our argument.

GRAHAM: You also said the courts of the United States have never entertained habeas lawsuits filed by enemy forces detained in war zones. If courts are ever to take that radical step, they should do so only with explicit blessing by statute. You stand by that?

KAGAN: Anything that is in that brief I stand by as the appropriate position of the United States government.

GRAHAM: Fair enough.

KAGAN: Well, the brief needs to be read by your supporters and your critics because some of your supporters are going to be unnerved by it and some of your critics may like what's in there.

I'm here to say, from my point view, that this area of your legal life you represented the United States well, and I hope that Congress will rise to the occasion, working with the executive, to provide some clarity so that we'll be able to find a way to fight this war within our value system and recognize the difference between fighting war and fighting crime.

The battlefield, you told me during our previous discussions, that the battlefield in this war is the entire world, that if someone were caught in the Philippines who is a financier of Al Qaida and they were captured in the Philippines, they would be subject to enemy combatant determination, because the whole world's the battlefield.

GRAHAM: Do you still agree with that?

KAGAN: Well, Senator, I was speaking there as a legal policy matter representing the position of the Obama administration. That's obviously a very different role as the advocate role that I played is also a different role.

GRAHAM: Let's just stop there. When you were an advocate, you had no problem advocating that position.

KAGAN: There are certain parts of that that I -- that I think that we have not addressed in the United States government, so the United States government has argued that the battlefield extends beyond Iraq and Afghanistan.

GRAHAM: Attorney General Holder said that the battlefield is the hearts, the minds, and wherever Al Qaida may reside. Do you believe that is a consistent statement with Obama policy?

KAGAN: Senator Graham, when I was here before, you asked me if I agreed with the attorney general, and I said that it would be bad to disagree with the attorney general, given my position. And I'm still the solicitor general, and I still agree with the attorney general.

GRAHAM: But you strike me as the kind of person that if you thought he was wrong, you'd say so even though it may cost you your job. Am I right in assuming that?

KAGAN: I certainly would tell him if I thought he was wrong.

GRAHAM: And I think you would tell me if you thought he was wrong, so I'm going to assume you thought he was right, because that's the kind of person you are. And I, quite frankly, think he's right.

Now, as we move forward and deal with law of war issues, Christmas Day bomber, where were you at on Christmas Day?

KAGAN: Senator Graham, that is an undecided legal issue, which -- the -- well, I suppose I should ask exactly what you mean by that. I'm assuming that the question you mean is whether a person who is apprehended in the United States is...

GRAHAM: No, I just asked you where you were at on Christmas.

(LAUGHTER)

KAGAN: You know, like all Jews, I was probably at a Chinese restaurant.

(LAUGHTER)

GRAHAM: Great answer. Great answer.

LEAHY: You know, I could almost -- I could almost see that one coming, and I thought...

GRAHAM: Me, too. So you were celebrating Hanukkah.

LEAHY: Senator Schumer explained this to me earlier.

GRAHAM: Yes, he did.

SCHUMER: If I might, no other restaurants are open.

(LAUGHTER)

GRAHAM: Right. You were with your family on -- on Christmas Day at a Chinese restaurant, OK.

KAGAN: Yes, sir.

GRAHAM: That's great. That's what Hanukkah and Christmas is all about.

(LAUGHTER)

Now, what happened in Detroit on Christmas Day? Can you recall? What was so unnerving about that day?

KAGAN: Well, that there was a failed, but -- but only just failed terrorist incident.

GRAHAM: We were lucky as a nation that a bunch of people didn't get killed on Christmas Day or in the middle of Hanukkah, whatever holiday it may be, aren't we? We're lucky that bomb didn't go off.

KAGAN: Senator Graham, it was a -- it seemed a close thing. And I don't know more than I read in the newspapers about that incident.

GRAHAM: I understand.

KAGAN: I was not, you know, involved in -- in any of the discussions about what to do on that day.

GRAHAM: All right. All right. The Times Square incident, you recall that, right?

KAGAN: Yes, sir.

GRAHAM: We were lucky that van didn't explode.

KAGAN: You know, every time one of these things happens, it is extremely unnerving and -- and, you know, makes us aware of the need to take efforts to make sure that such a thing never...

GRAHAM: Tell me about Miranda warnings. Do we need to read soldiers -- do soldiers need to read people their rights captured in a battlefield in Afghanistan?

KAGAN: Senator, the way Miranda warnings would come up is, of course, only with respect to the admissibility of evidence in a criminal court. So to the extent that we're talking about a battlefield capture and not a -- a -- a criminal trial, an Article III criminal trial, the Miranda issue would never come up.

GRAHAM: So you agree with me that in war you don't have to read the enemy their rights because you're not talking about fighting crime, you're talking about fighting a war, is that correct?

KAGAN: Well, the Miranda issue is only applicable in Article III courts, as a matter of criminal law.

GRAHAM: OK. If you catch a person in Afghanistan...

KAGAN: I should -- I should correct that. I should correct that, because I think that the question of whether Miranda is applicable in military commissions has not been decided.

GRAHAM: Right. Well, you have Article 31 rights, which are the same thing, but that is yet to be decided. But under general rule of war, you don't -- you don't read the enemy the Article 31 rights when you're in a firefight.

For these hearings to be meaningful and -- and instructive, I think it's good for us to have an open discussion about when we are fighting a war and when we're fighting a crime. What's the consequences of criminalizing this war?

My fear is that, if we criminalize this war, we're going to get Americans killed for no higher purpose and that the idea that you would take someone off an airplane or in Times Square and start reading them their Miranda rights within a few hours is criminalizing the war, because the reason we're capturing these people initially is to find out what they know about the enemy.

Do you have any concerns that reading Miranda rights to suspected terrorists caught in the United States would impede our ability to collect intelligence?

KAGAN: Senator Graham, I've never dealt with that question as solicitor general and...

GRAHAM: Just as Elena Kagan.

KAGAN: Senator Graham, I feel as though...

GRAHAM: Harvard Law School dean.

KAGAN: I'm a part of this administration, and I think that, you know, I should let the attorney general...

(CROSSTALK)

GRAHAM: Well, let me tell you the administration, generally speaking, has been pretty good to work with on this issue. We have had discussions about having exceptions to Miranda so that we don't lose intelligence-gathering opportunities and not criminalize the war. What does the public safety exception mean when it comes to Miranda? What's your understanding?

KAGAN: So the public safety exception, which comes from the Quarles case, it's -- it's -- it's right now, I think, a limited exception. It enables...

GRAHAM: Very limited.

KAGAN: That's right.

GRAHAM: Very undefined.

KAGAN: It enables the police, essentially, to be able to question, to -- to -- to find the gun, you know, to find something that might pose an imminent risk of public safety.

GRAHAM: Now, let's stop there. So the public safety exception is about protecting the law enforcement officers and maybe securing the crime scene. What I'm trying to illustrate is that the -- the public safety exception I'm looking for would allow the intelligence community to find out about where this guy came from. Where did you train? Is there another attack coming?

And right now, the law is very -- do you think it would be in the United States' best interest to have clear guidance to our intelligence community, give them the tools and the flexibility when they capture one of these guys, whether it be in Times Square or in Detroit, to find out, without having to do anything else at the moment, what's the next attack? What do you know about future attacks? Where did you train? Would that make us a more secure nation if our intelligence and law enforcement community had those tools, in your opinion?

KAGAN: Well, of course, it's a question that might come before the court in some guise, as to whether the public safety exception should apply...

(CROSSTALK)

GRAHAM: I'm just talking about being an American now. Forget about the courts. As an American -- a patriotic American, liberal or conservative -- don't you believe that we would all be better off if we had the opportunity within our values, humanely, without torture, to hold a terrorist suspect and gather intelligence before we did anything else, because another attack may be coming, not that a gun is in the next room, but somebody else may be coming our way? Don't you think as an average, everyday citizen that would make us a safer nation?

KAGAN: I suppose on this one, Senator Graham, that I'm reluctant to say how I would think about the question as an average, everyday citizen because I might have to think about the question as a judge, and that would be a different way of thinking about the question.

GRAHAM: OK, let's talk about what a judge may think about here. If we applied domestic criminal law to the -- to the war on terror without any hybrid mix, would that be a good thing? I mean, if we took the -- the -- the war on terror and just made it a crime, would we be limiting our ability to defend ourselves?

KAGAN: Well, as we discussed before, Senator Graham, I mean, the administration, of which I'm a part...

GRAHAM: But here's what I don't understand, is because you said to me previously that you understand why this administration are holding 48 people without trial, because they're enemy combatants, and that makes sense to you.

What I'm trying -- trying to extrapolate is, if we took other parts of criminal law and applied it to the war on terror, would that create a problem for this country, like Miranda warnings?

KAGAN: I guess I feel -- yes, I mean, the question of detention of enemy combatants is one that I've dealt with as solicitor general, is one that I've argued as solicitor general. This is a question that I have not dealt with.

KAGAN: And -- and I'm hesitant to make any comments about in a personal view or in a policy view given that these questions, I think, are likely to come before the court -- the question of the good faith exception to Miranda, how it applies to terrorism cases is, I think, quite likely to get to the court.

GRAHAM: Is it fair to say that the letter you wrote to me about the Detainee Treatment Act amendment, I think you -- you call the Graham-Kyl proposal that it would lead to dictatorship or...

KAGAN: No, I didn't say that.

GRAHAM: What did you say? I'm not easily offended. You can say it. It would probably help me in South Carolina...

(CROSSTALK)

GRAHAM: Back home, it wouldn't hurt, so I'm not..

(CROSSTALK)

GRAHAM: Back home, it wouldn't hurt that the Harvard Law School dean was mad at Lindsey. But -- but you did. You wrote a letter that was pretty -- pretty challenging.

(CROSSTALK)

KAGAN: It was a challenging letter. Senator...

GRAHAM: I've got it. I mean, I'll give it to you.

KAGAN: Senator, I think -- I think I said that we hold, you know, dictatorships to high standards and we should hold ourselves to even higher ones. But I did -- I did criticize the initial Graham amendment.

GRAHAM: And that's absolutely OK. That's absolutely OK. You did criticize the original Graham amendment and I didn't take it personally.

KAGAN: I'm glad to hear that.

GRAHAM: But you did say that's what dictatorships do, and I thought that was a little over the top. But the difference between the Graham-Kyl amendment and the amendment that passed by 84 votes wasn't a whole -- what's the -- what's the difference between what I proposed and what passed?

KAGAN: Right. Well, I think one difference was that military commission adjudications now receive D.C. Circuit review. In fact, the letter we wrote was about that -- was saying that military commission adjudications...

GRAHAM: Now, did you assume that we precluded final verdicts in military commissions from article 3 review?

KAGAN: Well, my initial understanding of the initial Graham amendment...

GRAHAM: We didn't, but you could have had that understanding, but I can assure you that wasn't my goal. The point I'm trying to make here is that the Military Commission Act of 2009 has been a work in progress for many, many years. And we're trying, as a nation, to get this right.

As solicitor general, do you have confidence in our military commissions that we've set up? Do you find that they're a fair forum to try people in?

KAGAN: Senator Graham, I really haven't had any exposure to the military commissions as yet. Of course, there's been no military commission proceedings.

GRAHAM: Have you had exposure to military lawyers?

KAGAN: I think that they are absolutely top-notch.

GRAHAM: What if I told you that the same lawyers who will be doing the commissions are also the same lawyers, judges and juries that would try our own troops? Would that make you feel better?

KAGAN: Well, I -- I do think that the military lawyers with whom I've had the pleasure and honor to work as solicitor general are stunningly good.

GRAHAM: So is it fair to say that Elena Kagan, whatever day it is in 2010, doesn't believe that military commissions are a miscarriage of justice or unconstitutional? I guess I'll strike "unconstitutional." Do you believe that this country submitting a -- a suspected terrorist to military commission trial is within our value system?

KAGAN: Senator Graham, I'm part of an administration that clearly has stated that some people...

GRAHAM: Do you personally feel comfortable with that?

KAGAN: I do. I wouldn't be in this administration if I didn't.

GRAHAM: Thank you. Thank you.

LEAHY: Thank you, Senator Graham.

Before I go to Senator Schumer, I should note when Senator Schumer has finished his questions, I'll just mention this here -- we'll have about a 10-minute break.

Senator Schumer?

SCHUMER: Thank you, Mr. Chairman.

And thank you, Solicitor General. I think you're doing just great. I think the hearings are showing you -- showing the American people that you are the kind of person many of us believe you to be -- thoughtful and practical and moderate. You try to understand and appreciate many differing points of view, but you have fidelity to the law above all.

I think they're learning, too, that you're a very nice person with a pretty good sense of humor. You know, there was a recent study I read that showed that showed that when he sits on the Supreme Court bench hearing cases, Justice Scalia gets the most laughs.

KAGAN: He is a funny man.

SCHUMER: Yes. If you get there, and I believe you will, you're going to give him a run for his money.

Anyway, it's -- I'd like to ask you a few questions, first about modesty, something we've talked about in this and other nominations. That's a very important quality to me, and I was really pleased to see you speak about modesty in your opening statement. And I thought you not only spoke eloquently about the importance of modesty, but you sort of embodied modesty in your whole demeanor and way, and have done that today.

So I think people don't believe it's just talk. You said you believed it was critical for judges to be deferential to the decisions of the people and their elected representatives. I agree. And while I think just about anyone can and everyone does pay lip service to the notion of judicial modesty, it can mean different things to different people.

So just tell us in general a little bit about what you mean by the idea of judicial modesty.

KAGAN: Senator Schumer, I think there are three components to it. The first is the one that you mentioned, which is deference to the political branches, to Congress, to the president, to the states. And understanding that they're looking after the people's business, that they're acting in good faith, that they, too, take constitutional oaths, that they ought to be the policymakers for the nation.

And that the courts -- the courts have an important role to play, but it's a limited role. It's essentially sort of policing the boundaries and making sure that Congress doesn't overstep its role, doesn't violate individual rights or interfere with other parts of the governmental system.

But that even in doing that, even in policing those boundaries, the -- the courts should look at the Congress and the president as -- should give a lot of deference and should be hesitant and reluctant to interfere, and should make sure that they understand what Congress is doing and why Congress is doing it before they do.

So to sort of give Congress, you know, a good deal of the benefit of the doubt, to try to look at those congressional findings that Senator Specter was asking me about, to really explore what Congress thought it was doing. And there will be some times where the courts will have to say, "No, Congress has overstepped. Congress has violated individual rights. Or Congress has -- has somehow interfered with state prerogatives perhaps." But those times, the court ought to feel hesitant about doing that and ought to make sure that it's gotten it right. So that's the first thing.

The second thing is respect for precedent. I think precedent is extraordinarily important in our law. It's important because it leads to predictability and stability in the law. But it's important also, precedent itself is a -- it's -- it's a kind of measure of humility. It's a way of current justices saying, "even if I think these past judges got it wrong, I'm going to be hesitant about saying that. I'm going to doubt myself. I'm going to think that this law that's built up over the years by prior judges has real wisdom to it. Even if I can't quite see that wisdom right now, I'm going to be hesitant about saying that it doesn't exist." So it's a doctrine really of humility, of judicial humility.

It's also a doctrine of constraint. It constrains judges and makes sure judges that aren't importing anything inappropriate into the decisionmaking process; so the judges aren't taking their personal view or their personal commitments or their political commitments and using those in the decisionmaking process. If you're -- precedent binds judges and that's a very good thing for the legal system for that reason, too.

And I suppose the third part of judicial modesty is a set of rules really about deciding cases. It's making sure that you have a case before you; that you're not deciding an abstract legal issue. It's taking one case at a time, not really thinking, you know, down the road how this -- if I decide this case this way, maybe another case can be decided that way. Really just focusing on the case before you and the question before you.

It's avoiding constitutional questions if you can in favor of statutory questions. It's generally making sure that you're deciding questions on the narrowest possible grounds, rather than on broader ones.

So all of those techniques of judging, if you will -- I mean, some people have -- have called these passive virtues, I think are very important.

SCHUMER: Well, I think that's a great answer. It's almost a textbook-like answer and I hope the Supreme Court continues to follow it, or follows it.

SCHUMER: Let me just ask you this. Would your own personal views ever play a part in interpreting the statute, given your definition of modesty?

KAGAN: They would not, Senator Schumer. I mean, with respect to a statute, the only question is Congress's intent. And that's what the court should be looking at, what Congress wanted the statute to apply to, how Congress wanted the statute to apply.

Now, you know, sometimes that won't be altogether clear. Sometimes Congress leaves ambiguities or uncertainties of various kinds, and it's the court's job to try to clarify those ambiguities and to try to remove those uncertainties. But it should all be done with the question of what has Congress intended here?

And -- and to the extent that, you know, the text suggests that, all well and good. To the extent it doesn't, the -- I think a judge should look to other sources, should look to the structure of the statute, should look to the history of the statute in order to determine Congress's will.

SCHUMER: Right. And just one final question. Let's just pause it for the moment. The term "activism," "judicial activism" is bandied around a lot, but it's, sort of, the opposite of modesty as you defined it and, I think, as most define it.

Just let me -- it's my view that activism, so to speak, which means beyond -- going beyond the bounds of modesty that you've outlined, can come from the right or from the left. It could probably even come from the middle in certain ways. Is that -- do you agree with that?

KAGAN: I think activism does not have a party.

SCHUMER: Or a philosophy?

KAGAN: Or a philosophy.

SCHUMER: There can be liberal activists and conservative activists.

KAGAN: I think that that's right.

SCHUMER: OK. All-righty. Let's go on now to pragmatism, the second quality that you've exhibited and talked about. And to me, at least, I find it refreshing that you're -- about your nomination, is you don't come straight from the judicial monastery, that you have real hands-on practical experience.

Because I think some of the times, certainly speaking for me, and I think most people think sometimes judges impose decisions from on high without any sort of thinking, or not enough thinking as to the practical effects on either a business or a person or a government or whatever.

And to me, the practical experience you had is almost the best one can have in terms of being a good judge because you've had to deal with the law in a very practical way.

And what I mean there is your tenure as dean of Harvard Law School. You managed a budget of over 160 million people, dealt with hundreds of employees, had a very fractious legal faculty who probably spanned the kind of judicial philosophies that you'll find should you get to the Supreme Court.

And your job, as dean -- I'm not saying as justice -- would -- was to, sort of, bring them together and create a better tone and better atmosphere, which you did, which most observers found -- you know, it almost -- they were in awe, almost, of what you did there, given how bad it was before and how smooth it was afterwards.

Just tell us a little bit about the challenges that you had and what you learned from them as dean -- practical stuff?

KAGAN: Well, mostly I learned, Senator Schumer, that you can never do too much listening to people. Because it turns out you learn a lot my listening.

And you said that the faculty was fractious and you, kind of, portrayed them in a negative light, but in truth, I loved my faculty. And -- and I thought that my faculty were, sort of, endlessly generous to me and good-spirited, in terms of the things that they did for the school.

And I think that that was so in part because people -- people respected that I listened to people, that I was willing to change my mind if -- if they could convince me that I was wrong, and sometimes I was wrong. And I, you know, got a lot of good ideas from my faculty along the way.

So I suppose the -- the best thing I learned by being dean of that school was just the value of listening hard and realizing that you don't start by knowing everything.

SCHUMER: And how did you -- how were you so successful in bringing people of different views who were pretty fractious when you walked in -- as I understand, it was hard to get faculty appointments because one part of the faculty would always object to the other. How did you get to bring them together into a body that was, at least from all reports, much more cohesive and happier as a result of your tenure there?

KAGAN: Well, Senator Schumer, I think, you know, everybody did it. I mean, I don't think -- I don't think I did it. I think everybody did it. And I think all -- all I did was try to encourage people to work together. And I think that, once that started happening, people just understood that working together brought great benefits to the institution. And it was a little bit of a, kind of, virtuous circle, you know. Because once it started, it just -- it kept on going. The ball kept on rolling, because people saw, you know, some of the good things that it -- it brought.

SCHUMER: This relates to something I've given a lot of thought about and still haven't come to any firm conclusions. What's the role of pragmatism in judging, in this sense?

This is a key question I've wrestled with. What happens when the law seems to lead to a result that just doesn't make any sense?

I've occasionally read decisions at every level -- they could be local level and individual stuff -- and the judge seems to be following the law, and then the actual result just, in the real world, doesn't make any sense.

Do judges have a responsibility to interpret a statute in a way that makes sense when it's actually applied?

KAGAN: Well, Senator Schumer, I think that, if the text of a statute is clear, it would be wrong for a court to say, well, the text says x, but I don't think x makes sense, so I'll choose y.

(LAUGHTER)

I don't think that a court should do that. If the text says x, the text is the best evidence of Congress's intent. And the text might say x for a variety of reasons, even if it's -- even if you think, well, gee, what sense does that make and how is that consistent with the broad purposes of the statute?

In fact, the legislative process is a messy thing and people make compromises along the way and -- and -- and a legislative text is the result of all that deliberation and all those compromises.

And to extent that the text says something clear about a statute, the court should stick with that and stick with it even if, in the court's view, that's not what makes sense.

Now, sometimes there's ambiguity in statutes. And then the question is, well, what do you do? How do you clarify that ambiguity?

And one of the things to do is to look to Congress's purpose in enacting a statute and try to figure out, you know, if -- if Congress knew that this result would happen, is that result consistent with Congress's purpose or not?

And that's a very sensible thing for a court to do because, in the absence of textual guidance and, maybe, in the absence of any, you know, structural guidance, one, you know, good and appropriate approach is to look to the purposes of the statute and to try to figure out which interpretation of the statute is more consistent with that congressional purpose.

And one way to do that is to say, well, what would that interpretation of the statute actually do in the world and is that consistent with what Congress thought ought to be done?

SCHUMER: Right, right. Good.

OK. Let me go to a couple of specific cases. One case, a recent case, was *Gross v. FBL*.

And there the court said that, in an age discrimination case, the statute passed by Congress requires the plaintiff to prove that the employer's only motive was discriminatory, even though, for years, courts have recognized that only employers have access to the evidence of their own motivation, almost said to a plaintiff who thought he or she was discriminated against, we're going to, sort of, put you in a catch-22; you've got to prove that the only motive was discriminatory, and you can't, which seems to me just in line for what you said; Congress never would have intended that because it is impractical and the law had some -- I think had some latitude in terms of interpretation.

I'm not going to ask you to comment because it's a specific case, but I'd at least like to throw that one out.

The second one, which I do want to talk about a little bit, is *Citizens United*, which has been talked about here before. It's a confounding and deeply troubling opinion for a whole lot of reasons.

I'm going to start with some basics of first amendment law. My colleagues and I may have some philosophical differences about campaign finance, and while I disagree with *Buckley v. Valeo*, it certainly undertook a lengthy First Amendment analysis.

SCHUMER: Yet, as we know, no amendment's absolute. The First Amendment isn't absolute. And there are countless cases, you know, related to libel, related to imminent danger. You can't scream "fire" in a -- falsely scream "fire" in a crowded theater.

So there are limitations on the First Amendment, like there are limitations on every amendment.

The *Heller* case recently and a case that was decided yesterday certainly said there could be limitations on the Second Amendment, even if it applied to the states in the way the courts did.

Do you agree with that principle, that no amendment is absolute, and there are reasonable limitations, balance tests on every amendment?

KAGAN: The First Amendment has not been thought to be absolute. I think that the last justice who thought that was -- was -- was maybe Justice Black. I think almost all justices have understood...

SCHUMER: I think he wrote a lot of dissents.

KAGAN: You know, you -- you yell "fire" in a crowded theater or you yell into a person -- to a cardiac victim's ear, and nobody is going to protect it under the First Amendment.

SCHUMER: Right. So then the correct question is, when is law tailored enough to address a specific action? And how strong is the government interest behind that law?

In the McCain-Feingold law, Congress -- as you talked about a little with some of the -- some of my colleagues here -- studied and considered the effect that special interest money had on campaigns. Congress came to the commonsense conclusion that these expenditures had a poisonous effect on our democracy.

But the five justice majority ignored Congress's judgment -- we won't go into the fact that they went out of their way to find the case -- and undermined Congress's powers to pass laws based on Congress's collective judgments.

And I think, you know, some of my colleagues on the other side of the aisle missed the mark of what McCain-Feingold was -- what was at issue about McCain-Feingold in Citizens United.

With respect to my good friend, Orrin Hatch's, earlier points, it wasn't about banning books or about restricting who can speak. It was about Congress making its best judgment on what limits on how much can be spent and what are the appropriate limits to protect our electoral process.

Congress tried to tailor its approach with respect to speakers and speech. And McCain-Feingold sets limits very high up. It's not about publishing a pamphlet. It's about putting an ad on for the 4,111th time. And is that the same right as saying it initially?

Corporations -- let's remember, corporations always -- could always spend money on politics. They had to do it through PACs. Congress made the determination that unlimited spending by corporations could create corruption and the appearance of corruption.

So I don't agree with how this case has been characterized by some of my colleagues. And, in fact, the court many times has upheld Congress's right to pass anti-corruption campaign finance laws. In 2003, the court said preventing corrupting activity clearly qualifies as an important governmental interest. And yet, just seven years later, with the addition of Justices Roberts and Alito, the court completely reversed itself.

The majority wrote, "This court now concludes that independent expenditures, including those made by corporations, do not" -- despite huge congressional findings to the contrary in what seems to me to be common sense -- "do not give rise to corruption or the appearance of corruption." Those two holdings clearly are not consistent, right?

KAGAN: Well, Senator Schumer, I argued the case before the court. I -- I focused quite heavily on the congressional record that -- that had been put together before McCain-Feingold. I argued that the court should give deference to that congressional record.

Now, the court disagreed. The court said use the compelling interest standard, which I think everybody agreed was the right standard, but said that standard had not been met.

SCHUMER: Yes. And what about -- what do you think -- if you could comment generally -- I'm not asking about the Roberts concurrence, in which he distinguished Austin as an aberration -- what do you think of that?

KAGAN: Oh, I'm sorry. Senator Schumer, the -- the government argued that it was not an aberration. And this was, you know, very much at issue in the case.

This was certainly the theory of -- of the other side, and it was adopted by the court, and specifically discussed in the chief justice's opinion, that -- that the chief justice said that Austin itself had been contrary to prior precedent.

The government argued that it had not been, that it was consistent with a line of precedent, and with a historic understanding of -- of -- of the appropriate role of...

(CROSSTALK)

SCHUMER: Yes, and there had been a broad line -- the government argued that there had been a broad line of cases that had been consistent with Austin, isn't that right?

KAGAN: Yes, that's correct.

SCHUMER: And the government argued that moving -- you know, distinguishing -- moving away from Austin was the aberration, right?

KAGAN: The government certainly argued that -- that moving away from Austin would be a -- a disruption of the system, especially given the reliance that Congress and that the states had placed on Austin.

SCHUMER: Right. OK, I'd like to move on here.

Just one little thing on these revered judges. You know, this was about the Israeli justice, Barak. I'd just like to ask you -- you -- you introduced a whole lot of people. You said you'd do a very nice introduction for any of us, which we appreciate.

Here's something you wrote about Judge Posner, who clearly doesn't have the same ideology, the same views as Justice Barak, or of -- or of many -- of me, for sure. But you wrote, "Judge Posner is a prober. He is constantly asking why the problems before him have arisen. What features of the world are responsible for the parties' conflict and their inability to resolve them? He's always exploring why legal documents are the way they are, behind the boilerplate statements and string citations provided by the litigants, what purposes and goals the law -- the law is seeking to serve."

Should I, because you wrote something so nice about Judge Posner, think that you have the same views that he does?

KAGAN: I think that that's a pretty good description of Judge Posner, but, no, I don't think you should think that.

SCHUMER: Same as with Judge Barak, right?

KAGAN: Same as with Judge Barak.

SCHUMER: Yes, OK, and we could probably find you wrote glowing tributes to all kinds of people of many different ideologies, so it'd be impossible for you to agree with all of them, right?

KAGAN: One of my greatest introductions was to Justice Scalia...

SCHUMER: There you go. OK, good.

KAGAN: ... whom I, in fact, have the greatest admiration for.

SCHUMER: Thank you for that.

(LAUGHTER)

Let's go a little -- let's go a little to foreign law, which came up a few times here. Some of your critics have implied that you'll improperly consider foreign law and sources in cases before you. They cite your inclusion of international law into the first-year curriculum -- shame on you -- for -- as an indication that you don't sufficiently respect the autonomy of the U.S. from foreign law.

Just so the record is clear, 100 percent, what do you believe is the appropriate role, if any, of foreign law in U.S. courts?

KAGAN: Senator Schumer, the American Constitution is an American document with an American history with American precedents. And the -- the -- the fundamental way in which courts should approach interpretation of that document is by looking at that document and the American sources that interpret it.

Now, there may be instances, such as some of the ones that -- that I suggested, where international law or foreign law is -- is -- is relevant. You know, the meaning of ambassador, the -- the interpretation of the authorization for the use of military force were two instances I gave.

But in general, this is an American Constitution which needs to be interpreted by American judges using American sources.

SCHUMER: All right. Is there any -- just tell us why you put international law into the curriculum at Harvard. Is it because, as some of the critics I've seen in some of the blogs and other places -- is it, as some of these critics suggested, because you believe it's more important than U.S. constitutional law?

KAGAN: No, Senator Schumer. It's what I said to -- to Senator Grassley, U.S. constitutional law is basic, is fundamental, but I do believe that law graduates in our world today need to have some understanding of the -- the -- the laws beyond American shores to do international litigation, to do international transactions.

We live in an interconnected world. We live in a competitive world. And if our lawyers don't understand that world, quite honestly, we're going to be at a competitive disadvantage.

SCHUMER: Right. Do you know any law school that doesn't have some kind of international law course in its curriculum?

KAGAN: I think that that would be unthinkable.

SCHUMER: Yes, OK.

And, of course, when an American judge considers many -- you know, considers -- they consider many nonbinding sources when they reach a determination.

SCHUMER: I asked this of Judge Sotomayor, because it came up then.

Judge Roberts in -- Judge Roberts' prominent citation in a Voting Rights Act case decided last year, Justice Roberts, he cited an article by NYU Professor Samuel Issacharoff published in the "Columbia Law Review." Would you agree that "Law Review" articles are not binding on American judges, even though they might be cited by some?

KAGAN: Some law professors would like them to be binding, but, no, I -- I agree, Senator Schumer, that -- that the way they're cited in -- in these decisions are just -- you know, this isn't -- this isn't binding, this isn't precedent, but this is a person who had a good idea, and -- and the decision in some sense cites or reflects that.

SCHUMER: And it sure wasn't improper of the chief justice to consider such sources in reaching his decision, was it?

KAGAN: Absolutely not.

SCHUMER: And how about Justice Scalia? He has a well-known regard for dictionary definitions in determining the meaning of words or phrases in statutes being interpreted by the court. In one case, MCI versus AT&T, Justice Scalia cited not one, but five different dictionaries to establish the meaning of the word "modify" in a statute. Would you agree that dictionaries are not binding on American judges?

KAGAN: That is correct.

SCHUMER: OK. But so was it -- but was it improper for Justice Scalia to consider dictionary definitions?

KAGAN: Of course

SCHUMER: Right. So in conclusion, wouldn't agree American judges of all ideological stripes keep their minds open to sources and ideas other than those that are directly binding them on them under the Constitution and the laws of the United States?

KAGAN: I -- I do think that that's right, Senator Schumer, that judges should keep their minds open, should learn from a variety of sources that are not binding, that do not have precedential force.

SCHUMER: Thank you.

Mr. Chairman, I'll yield back my remaining time.

LEAHY: Thank you very much.

And, of course, I'd encourage any senators who want to do that. And we will stand in recess for approximately 10 minutes, and everybody get a break.

How are you doing?

KAGAN: I'm good.

LEAHY: OK. I'm enjoying some of the ethic humor here from...

(LAUGHTER)

Wait till I talk about the Italian side and the Irish side of my family and the French-Canadian side of my wife's family. Oy vey, we'll have something going.

We stand at recess.

(RECESS)

LEAHY: The only reason I don't stop the photographers immediately, they have the one job that I wish I had if I wasn't in the U.S. Senate, and that's being a photographer. So I don't -- it's sheer envy. I can't -- I can't stop them.

We have -- we're going to see how far we can go. And, Senator Cornyn, you've been waiting patiently here for a day-and-a-half. Please go ahead.

CORNYN: Thank you, Mr. Chairman.

Ms. Kagan, you -- you had an interesting and refreshing exchange with Senator Graham a little earlier about Miguel Estrada, who, as you know, was nominated to the circuit court of appeals, and -- and I would say that your friendship and mutual admiration is apparent.

And -- but I'm curious. During the time that he was nominated to the circuit court of appeals, did you ever speak out publicly or talk to him privately about his nomination and the fact that he was filibustered seven times?

KAGAN: You know, I -- I -- I don't think that we -- we've sort of been in and out of the touch during those years. I'm not actually sure that we talked during that time. We might have; I'm just not sure.

CORNYN: And I gather you did not have any public comment about the filibuster of his nomination?

KAGAN: Senator Cornyn, I would have done whatever he asked me to do, because I think he's a great lawyer, as I said, and a great human being. I don't think he ever asked me. There was a time when I was dean when I didn't do any letters of that kind. Before I was dean, I wrote letters of that kind for Michael McConnell and for Peter Keisler. I think, if I didn't with Miguel, it's because he never asked me to do so.

CORNYN: You've had a very interesting questions-and-answers sessions from Senator Specter, who asked you about cameras in the courtroom. I happen to agree with him and you that that would be a great educational opportunity for the American people.

I know from experience that cameras can be placed unobtrusively in appellate court, and no one really pays any attention to them, but it's a great opportunity for people to watch and learn, just as I hope they are watching and learning something about -- about our judiciary and the Supreme Court as a result of these -- of these hearings.

While I agree with you on that point, I -- I confess to be troubled still about the exchange that you had with Senator Sessions over banning military recruiters at Harvard, and I expect we'll come back to that at a later point.

But what I'd like to go back to is where I started in my opening statement, talking about the traditional concept of the role of a judge and an activist, as I try to define it, one that -- traditionalists who felt bound -- feels bound to a written constitution and written laws and precedent, as opposed to judges who believe that there is -- that there -- whether it's their empathy, as the president has talked about it, or a living Constitution, which has no fixed meaning, that's what I mean by the activist role.

In an earlier exchange with Senator Leahy, you stated that there are two ways to change the Constitution, obviously by Article V, and you said by, secondly, by court decision. And I want to ask you a little bit about that.

You cited *Brown v. Board of Education* as an example of a court decision that changed the Constitution, stating that the framers of the 14th Amendment believed it allowed segregation in its schools.

I believe -- and I think a number of prominent legal scholars agree -- that *Brown* did not change the Constitution. Rather, I believe *Brown* affirmed and restored the original meaning of the 14th Amendment by overturning the repugnant and constitutional separate but equal regime sanctioned by *Plessy v. Ferguson*.

And so I support *Brown* on originalist grounds. I would just refer to you, Senator Charles Sumner, a leading framer of the 14th Amendment, who said it's easy to see that the separate school founded on an odious discrimination, and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of equality.

And between 1870 and 1875, both houses of the United States Congress voted repeatedly by significant margins, majorities, in favor of legislation premised on the theory that segregation of the public schools is unconstitutional.

So, in light of this history, I believe that *Brown* did not change the Constitution, but rather realigned the interpretation of the 14th Amendment with the intentions of the framers of the 14th Amendment. And so on this, you and I may disagree, but let me...

KAGAN: If I could, Senator Cornyn?

CORNYN: Sure.

KAGAN: I think I didn't say that *Brown* changed the Constitution. I think I said that *Brown* interpreted the Constitution in a different way than it had been interpreted theretofore.

I do think it's hard to make the case that school desegregation was thought of as commanded by the 14th Amendment in 1868. And I think that there are a variety of other practices that similarly were countenanced in 1868 that are not now.

Now, that doesn't mean that the Constitution has changed. In fact, the Constitution's equal protection clause is a quite general provision. It speaks in broad terms. It lays down a general principle of equality.

And in writing the provision that way, I think that the drafters of the Constitution knew exactly what they were doing. They didn't mean to constitutionalize all of their practices in 1868. They meant to set forth a principle of equality that would be applied over time to new situations and new conditions. And I think that's exactly what has occurred.

CORNYN: I appreciate your answer. What I'm trying to figure out is whether you and I agree or disagree about how the American people can change their Constitution. Do you think the court can change the Constitution? Or do you agree with me that Article V has the sole means by which the Constitution can be modified, that is, either through a constitutional amendment or a constitutional convention proposing constitutional amendments, which are later ratified by three-quarters of the states?

KAGAN: I think the Constitution is a timeless document setting forth certain timeless principles. It's the genius of the Constitution that not everything was set forth in specific terms, but that instead certain provisions were phrased in very general terms that enabled people -- that enabled the courts over time to apply the principle to new conditions and to new circumstances.

And I think that that's the continuing obligation of the court to do that, to ensure that the Constitution does apply appropriately and that the timeless principles set forth in the Constitution do apply appropriately for our posterity.

CORNYN: Do you believe in the idea of a living Constitution, that the Constitution itself has no fixed meaning?

KAGAN: You know, I -- I think that -- I -- I don't particularly think that the term is apt, and I especially don't like what people associate with it. I think people associate with it a kind of loosey-goosey style of interpretation in which anything goes, in which there are no constraints, in which judges can import their own personal views and preferences. And I most certainly do not agree with that.

I think of the job of constitutional interpretation that the courts carry on as a highly constrained one, as constrained by text, by history, by precedent and the principles embedded in that -- in that precedent.

So the courts are -- are -- are limited to specifically legal sources. It's a highly constrained role, a circumscribed role. So -- so to the extent that that term is used in such a way as to suggest that that's not the case, I -- I don't agree with that.

But I do think, as -- as I just indicated, that the Constitution, and specifically -- not the entire Constitution, but the general provisions of the Constitution, that the genius of the drafters was -- was to draft those so that they could be applied to new conditions, to new circumstances, to changes in the world.

CORNYN: So I'm clear, do you agree or disagree that the Supreme Court of the United States can change the Constitution?

KAGAN: The Constitution does not change. The Constitution is -- you know, unless by amendment.

KAGAN: The Constitution is a document that does not change, that is timeless, and timeless in the principles that it embodies.

But it, of course, is applied to new situations, to new facts, to new circumstances all the time. And in that process of being applied to new facts and new circumstances and new situations, development of our constitutional law does indeed occur.

CORNYN: And so do you agree that honoring the Constitution means respecting only the ability of the people to change it through constitutional amendment under Article V?

KAGAN: Senator Cornyn, Article V gives the only way to actually amend the text of the Constitution. That is the only way to amend the text of the Constitution.

But I also want to say, again, the sort of second half of this, that the text of the Constitution has to be applied to new circumstances, to new conditions, to new developments in the world, and that it's the job of the courts to do that.

CORNYN: And I -- I can't disagree with what you just said. But to me when you interpret the Constitution, how it applies to a given set of facts, that does not to my way of thinking imply that you're changing the Constitution, but rather interpreting and applying the Constitution to that set of facts.

Do we agree?

KAGAN: I think that's right. The Constitution is the Constitution. But it is interpreted and it applies to new facts as they come up, new cases as they come up, new circumstances as they come up.

CORNYN: As I've...

KAGAN: So just to, you know, give a concrete example of this...

(CROSSTALK)

CORNYN: Let's move on, because I think you and I agree so far. But let me challenge it a little bit more.

As I've defined the term judicial activism, that is the belief that there is no such thing as a fixed meaning of the Constitution and laws, but rather judges possess some sort of power to create constitutional rights out of whole cloth, do you believe that that kind of judicial activism, as I've tried to define it, is ever justified?

KAGAN: I think that judges are always constrained by the law. They're constrained by, you know -- I mean, sometimes the text speaks clearly and then they're constrained by the text alone.

Where the text doesn't speak clearly, they look to other sources of law. They look to original intent, they look to continuing history and traditions. They look to precedent and the principles embodied in those precedent.

But they're always constrained by the law. It's law all the way down.

CORNYN: Let's change the topic slightly and talk a little bit about federalism.

Millions of Americans believe that the federal government is simply out of control today because they were taught, as perhaps all of us were taught, that the federal government is one of enumerated powers, and then all powers not delegated to the federal government are retained by the people and by the states. That's paraphrasing the Tenth Amendment, of course.

Under the framers' Constitution, the Supreme Court has an important role in limiting the reach of the Congress, which in my experience and my observation knows no limits to its own power.

The only way Congress is going to be restrained is one of two ways. One is either the court is going to say you've gone too far, which occasionally they've done, and otherwise, to have the people amend the Constitution, either through the constitutional amendment process or through the constitutional convention process, proposing amendments which are then ratified.

But do you agree with me that Supreme Court cases in recent decades have largely eliminated the important role of the Supreme Court in checking the size and scope of the federal government?

KAGAN: Senator Cornyn, I -- I guess I actually think that recent decades the court has suggested that there are some limits on the scope of the federal government.

So if you go back to the earliest days, Chief Justice Marshall in *Gibbons v. Ogden*, that was the first place that -- or at least the first important case that interpreted the scope of the commerce clause, and there Justice Marshall wrote a fairly expansive opinion, talking about the interconnectedness of the United States and the need for the nation to function as a nation.

Now, over time the court imposed very significant limits on Congress's power -- this was basically until about 1935 -- imposed very significant powers -- limits on Congress's power under the commerce clause.

At that point, a switch took place and the Supreme Court determined that the old jurisprudence really wasn't working, that the distinctions that the court had set up between direct and indirect effects on Congress wasn't working, that the distinction that the court had set up between manufacture and commerce wasn't working.

And the court also, I think, realized, and this was really the great recognition of those New Deal years, was that deference to Congress was appropriate in this area.

CORNYN: How about -- how about today? You talked about some legal history that I'm vaguely familiar with. But today -- let me give you an example. I'm not going to ask you to decide or tell us how you would decide the case, but, for example, many Americans are concerned that the federal government in the recent health care legislation that was passed, that Congress has imposed an

individual mandate on health coverage and imposed a penalty, a financial penalty if you don't purchase government-approved health insurance.

To my knowledge, that would represent an unprecedented reach of Congress's authority to legislate under the Interstate Commerce Clause, under the guise of regulating interstate commerce.

But again, the Tenth Amendment, which I think most people sort of popularly view as an expression of our federalist system, and the fact that the states and individuals retain power that's not been delegated to the federal government, has largely, in my opinion, been rendered a dead letter by Supreme Court decisions.

Now, I grant you that the Rehnquist court, the Lopez case and others, did begin to work a little bit around the edges. But if Congress can force people to -- who are sitting on their couch at home -- to purchase a product and penalize them if they don't purchase the government-approved product, it seems to me there is no limit to the federal government's authority and we've come a long, long way from what our founders intended.

Do you...

KAGAN: Well, I think the current state of the law is to grant broad deference to Congress in this area, to assume that Congress knows what's necessary in terms of the regulation of the country's economy, but to have some limits. And the limits are the ones that were set forth in the cases that you mentioned, the Lopez case and the Morrison case, which are where the activity that's being regulated is not itself economic in nature, and is activity that's traditionally been regulated by the states.

But to the extent that Congress regulates the channels of commerce, the instrumentalities of commerce, and also to the extent that Congress is regulating things that substantially affect interstate commerce, there the court has given Congress broad discretion.

CORNYN: And would you agree with me that if the Supreme Court of the United States is not going to constraint the power grabs of the federal government and constrain Congress in terms of its reach down to people's everyday lives, that there remain only two constitutional options available?

One is either to pass a constitutional amendment -- for Congress to pass them and then to have that ratified by three-quarters of the states; or for a constitutional convention to be convened for purposes of proposing constitutional limits on Congress, which would then have to be ratified by three-quarters of the states.

Do you agree with me that's the only other recourse of the people to a limitless reach of the federal government, assuming the Supreme Court won't do it?

KAGAN: Well, I do think that there are limits on Congress's commerce power. They're the limits that were set forth in Lopez and Morrison. And they're basically limits saying that Congress can't regulate under the commerce clause where the activity in question is non-economic in nature.

I think that that's the limit that the court has set. And -- and with -- but with -- but within that you're quite right that Congress has broad authority under the commerce clause to act.

KAGAN: And, you know, to the extent that you or anybody else thinks that Congress ought not to have that authority under the commerce clause to act, an amendment to the commerce clause would be a perfectly appropriate way of changing the situation.

CORNYN: Under Article 5 of the Constitution -- in other words the amendment process?

KAGAN: Yes, yes, yes.

CORNYN: Either through a constitutional amendment proposed by Congress or a constitutional convention?

KAGAN: You know, any part of it -- any part of the Constitution can be amended through Article 5.

CORNYN: I was -- I was pleased to hear you say that once decided by the Supreme Court, even by a 5 to 4 margin, that cases like Heller, McDonald, Citizens United are -- are the law of the land and entitled to -- entitled to deference by succeeding courts, even if you may disagree with the outcome. Did I state that correctly?

KAGAN: Yes, surely. The entire idea of precedent is that you can think a decision is wrong. You can have decided it differently if you had been on the court when that decision was made. And -- and nonetheless you are bound by that decision. That's -- if the doctrine of precedent enabled you to overturn every decision that you thought was wrong, it wouldn't be much of a doctrine.

CORNYN: I would just distinguish that from Congress. The rules, I guess, dating back to parliament in England that no Congress, no parliament could bind a succeeding parliament. So this Congress can pass a law next Congress and essentially repeal a congressional act. That's entirely appropriate should Congress decide to do that. Correct?

KAGAN: That's quite right, Senator Cornyn. It's a really fundamental difference between the legislative process and the judicial process. And the reason that the doctrine of precedent has developed -- well, I suppose many reasons. One is just the incredible importance of stability in the system, but also just a notion of humility, that no judge should look at a case and say, "Oh, I would have decided it differently; I'm going to decide it differently." That a judge should view prior decisions with a great deal of humility and deference.

CORNYN Well, it would -- it would be a strange system indeed if succeeding Supreme Courts -- in other words, once you're confirmed to the Supreme Court and are sitting there, it would be a strange situation if then the litigants could bring the same case back that was decided in McDonald or Heller. And because you happen to disagree with it, that you could change the meaning of the Constitution more or less at will. That would not be a good system of jurisprudence, would it?

KAGAN: I -- I do believe that, Senator Cornyn. I think when the court looks as though it's flipping around and changing sides just because the justices have changed, that that's bad for the credibility of the institution and it's bad for the system of law.

CORNYN: Let me talk a little bit more about guns. I was -- I was -- I kind of chuckled when I saw a notation in some of the records we got from the Clinton archives that you referred to some of the gun advocates as "gunners." But I really didn't take that too seriously. I just thought it was kind of -- made me chuckle a little bit.

KAGAN: You know, I don't know what you're referring to, Senator Cornyn. I have not seen that ever.

CORNYN: OK. Well, maybe I'll show that to you sometime.

But I just want to...

KAGAN: You know, "gunner" is a kind of law school term of art.

CORNYN: Well, basketball, law school, whatever, it's...

But let me just ask you, isn't it true that in the McDonald case, as in the Heller case, that the court did not touch a number of permissible prohibitions on gun ownership and gun possession? For example, concealed weapons prohibitions, prohibitions on possession of firearms by felons or persons who are mentally ill, carrying guns in government buildings and the like.

In other words, just by recognizing that an individual right to bear and keep arms, the Supreme Court didn't touch those prohibitions on gun ownership under a number of those circumstances, wouldn't you agree?

KAGAN: Senator Cornyn, I have not yet had a chance to read the McDonald opinion that came out yesterday, but I know that in Heller, the court specifically says that nothing in the opinion is meant to suggest the unconstitutionality of a number of kinds of provisions. And I think the kinds of provisions listed in Heller are felony-in-possession laws, are laws regulating the possession of guns in certain sensitive places. And I think there's one dealing with various commercial activities regarding guns.

CORNYN: Right.

KAGAN: But -- so the court said that really nothing in its opinion is meant to in any way cast doubt on the constitutionality of those longstanding laws.

CORNYN: I would just -- and in McDonald v. Chicago, Justice Alito on page 39 and 40 of the slip opinion reiterated the same assurances that you just talked about in Heller, that they would apply in the -- after the McDonald case was decided as well.

Ms. Kagan, one of the things that you've heard a lot of us talk about season obviously you've had a very distinguished career, and we all congratulate you for the great honor of being nominated to the United States Supreme Court. But since you haven't been a judge -- and, no, that's not a disqualifier. We all know that. We don't have a judicial record, for example, like we had with Judge Sotomayor, by which to sort of see what her track record looked like when it came to deciding cases.

And so we've been trying to get everything we can to understand where you're coming from, how you would perform your duties as a judge. And I congratulate you on your testimony here today. I

think -- I think you' done a good job of explaining from the witness chair how you would decide cases.

But one of the things that makes me a little skeptical sometimes is, for example, during the confirmation hearings of Judge Sotomayor, she said -- we were talking about the right to keep and bear arms -- she said, "I understand how important the right to bear arms is to many, many Americans. In fact, one of my God children is a member of the NRA and I have friends who hunt. I understand the individual right fully that the Supreme Court recognized in Heller." Let me read that last sentence again. She said, "I understand the individual right that the Supreme Court recognized in Heller," close quote.

But on Monday, in the dissenting opinion filed by Justice Sotomayor, along with Justices Breyer and Ginsburg, that dissenting opinion said, quote, "The framers did not write the Second Amendment in order to protect a private right of armed self-defense," close quote.

I don't know how you reconcile those two statements -- that there is an individual right, and then to conclude later on in the context of McDonald that the framers did not write the Second Amendment in order to protect a private right of armed self-defense.

Justice Sotomayor went on and said, "I can find nothing in the Second Amendment's texts, history or underlying rationale that would warrant characterizing it as fundamental in so far as it seeks to protect the keeping and bearing of arms for private self-defense purposes."

Now, it is disconcerting, to say the least, where what appears to me, and in fairness, does appear to be a direct contradiction of what Judge Sotomayor said in her confirmation hearings, with what she has decided on the first opportunity to decide a case on that same subject.

And so you understand why members of the committee are careful to understand not just the qualifications, background, experience, but the -- but the judicial philosophy and approach of the nominees so that we can have some reasonable assurance that the way the nominee testifies is, not in deciding individual cases, but generally speaking, going to be honored and respected once they receive a lifetime appointment.

Let me just ask you: Do you believe that the Second Amendment guarantees a fundamental individual right to keep and bear arms for law-abiding Americans?

KAGAN: Senator Cornyn, I think that Heller is settled law and Heller has decided that the First - the Second Amendment confers such an individual right to keep and bear arms.

CORNYN: And do you believe the majority in McDonald -- do you agree with that decision that the Second Amendment is fully applicable to the states, has full stare decisis effect? And is there any reason that you know of it would not be controlling?

KAGAN: There is -- there is no reason I know of that McDonald as well as Heller is settled law entitled to all the weight the precedent usually gets.

CORNYN: Well, in the minute and 35 seconds we have remaining for this round, let me just ask you, take you back again to Citizens United.

CORNYN: And I think a number -- in the opening statements you heard a number of differences in opinion on the part of this committee about -- about the decision.

But I would ask something you said that the court would look at in determining the -- the constitutionality of restrictions on free political speech, that I think I heard you say that the court could look at the motives of the people advocating those restrictions. Did I understand that correctly?

KAGAN: I don't think so. I'm not sure what I -- what I said that you might have gleaned that from. I actually did write an article about this during my years as a law professor at the University of Chicago. It was not that the court should look to the motives of the legislature; it was really that first amendment doctrine -- a lot -- quite a number of the rules of first amendment doctrine were understood as reflecting a concern about governmental motive but that the rules were set up so that the court never had to make that underlying inquiry about governmental motive.

CORNYN: Let me ask you one last question in the few seconds we have. Let's -- assuming that a majority party -- let's say Democrats, who enjoy a very large majority in both houses of the legislature, decide to suppress the speech of political supporters of the minority because they have the votes in order to so, in effect, trying to put a thumb on the balance on the scales, in terms of political speech.

Do you think a court can look at those kinds of motives, seeking advantage, picking winners and losers in the course of restricting political speech?

KAGAN: Senator Cornyn, I think that the court does it, but not by looking directly at motive. The most -- one of the most important doctrines of the first amendment is the near complete ban on viewpoint discrimination, that viewpoint discrimination is held to the highest constitutional standard.

And -- and that's because of a concern that the majority is attempting to suppress the speech of a minority. And the classic example is very much along the lines that you gave, is, you know, a legislature saying there will be no speech by Republicans or there will be no speech by Democrats. And the way that the court would view that is that that's a classic example of viewpoint discrimination and is pretty much presumptively prohibited.

LEAHY: Thank you. Senator Durbin?

DURBIN: Thank you, Mr. Chairman.

Ms. Kagan, welcome.

You're probably aware of the fact that, about 12 years ago, then Majority Leader Tom Daschle began a tradition -- thank goodness it became a tradition -- that, every two years, the Senate would join the justices of the Supreme Court for dinner at the Supreme Court building.

It's one night out of two years and the only time we come into direct contact with justices on the Supreme Court in a social setting. And most of us look forward to it and wonder which Supreme Court justice we'll draw at our table to have a chance for conversation.

And this last time that we got together, I was sitting with Justice Kennedy. And we talked about a lot of things. And I said to him at one point, it appears that I'm going to be chairing the crime subcommittee of the Senate Judiciary Committee, and what kind of issues do you think I ought to consider?

And he said, "Well, I'll tell you what I think, and I'll tell you, most Supreme Court justices would probably agree with me." And he mentioned an issue which has not been raised during the course of this hearing. It related to the system of incarceration and corrections in the United States.

He felt, and I agree, that our system is broken, badly broken. Today in the United States, more than 2.3 million people are in prison. We have the most prisoners of any country in the world, as well as the highest per capita rate of prisoners in the world. And African-Americans are incarcerated at nearly six times the rate of white Americans.

One of the highlights of Justice Sotomayor's confirmation hearing last year was Senator Sessions, who told Wade Henderson of the Leadership Conference on Civil Rights, and I quote him, "We're going to do something about that crack cocaine thing."

(LAUGHTER)

Many people joked about Senator Sessions' choice of words, but I heard him and followed up on it because I was glad to hear that he shared my interest in this important issue. He was referring to the crack/powder disparity in sentencing in the United States, which is one significant cause for record levels of incarceration and racial disparity in our system.

It takes 100 -- under current law, it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum sentences. Possessing five grams of crack cocaine carries the same five-year mandatory minimum sentence as selling 500 grams of powder cocaine.

Senator Sessions is a man of his word. Earlier this year, the committee unanimously passed legislation to reduce the crack/powder disparity from 100-1 to 18-1. Some of us had hoped for 1-1 or some other configuration, but this was, in fact, a wholesome bipartisan agreement that was reported favorably with an overwhelming vote from this committee and then passed on the floor with a voice vote, now sitting in the House, which I hope they'll soon address.

You were involved with this issue during your time in the Clinton White House. In 1997, you and your colleague Bruce Reed, who I believe was with you yesterday, recommended that President Clinton support a 10-1 crack/powder ratio, and you wrote, "precisely because it takes a middle position. This recommendation offers the best hope of achieving progress."

Perhaps, if you'd been advising this committee, we could have taken action on the issue even earlier. Some have argued that you demonstrated your far-left political views during your time in the Clinton White House, but I think this example and many others prove them wrong.

Can you give me your views on this crack/powder ratio disparity, why you thought 10-1 was a reasonable alternative, and if you could, address this general question that Justice Kennedy raised about what's happening in America when it comes to our prisons and corrections system?

KAGAN: Senator Durbin, the -- the crack/cocaine ratio is the part of our sentencing system that I've had most to do with as a policy matter when I was in the Clinton White House, and when I was serving as a policy aide to the president, we did deal with this issue and -- and suggested that the ratio be reduced to 10-1.

I think, at that point, some of us felt that it might go down even further, but thought that 10-1 was the practical approach to take, that it was conceivable.

Now, in the end, it wasn't; that was, that the Clinton administration did not manage to make progress on that issue. I know that the attorney general whom I serve and the president, President Obama, has stated that their view is that it should go down all the way to 1-1, that, in fact, there's no real rational distinction between crack and powder cocaine for -- for sentencing purposes. The -- and that the -- the distinction that does exist is a distinction that has a great deal of racially disproportionate impact.

I know that Congress has struggled with this issue. It is a policy issue, quintessentially. It's one, you know, that Justice Kennedy -- he could have said, well, this is a good idea or that's a good idea, but it really is one for Congress. There's -- there's nothing that the Supreme Court or that any court can do about it. It's really one that Congress has to decide what the sentencing rules ought to be with respect to crack and powder cocaine.

As a policy aide and -- to President Clinton, and President Clinton felt strongly that it should go down. I tried to the best of my possibility to implement his policy view on that question. President Obama believes the same.

But as a judge -- as a judge, the only thing that would matter would be the actual statute. And -- and unless and until Congress changes that statute, the -- the current sentencing system would be the system that any judge should apply.

DURBIN: So go to the broader issue for a moment. And I understand what you're saying. We write the laws, and as a judge, you need to follow those laws.

As you step back, looking at the system -- I mean, in light of your training in the law and all you've done, when you look at our system of corrections, incarceration in this country, and you see the dramatic incarceration of minorities in our country, for example, does it suggest to you that we truly have equality under the law?

KAGAN: Senator Durbin, the -- the crack/powder distinction is the one that I've dealt with most.

KAGAN: There are many that I have not dealt with as a policy matter. I have seen some sentencing issues with -- in my time as solicitor general. But I have tried very hard during that time to apply the law that exists and to take appeals in the way that -- that appropriately implements that law.

So, you know, I think this -- this -- I think justices of the Supreme Court are appropriately interested in these kinds of questions. I know Justice Kennedy has taken a deep interest in sentencing issues. I think that that's much to his credit.

But it's -- it's a kind of an interest that I think has to be advanced in conversations of the kind that he had with you. Because, when a justice sits on the bench, the justice can only apply the law that Congress gives him or her. And it really is up to Congress to decide whether the system that we have is the correct one or whether to change it.

DURBIN: I'd like to take this line of questioning to the next level, the ultimate criminal penalty, the death penalty. Because what I found interesting -- I'm such a fan of John Paul Stevens. And if you look back at his political origins, we came out of different branches, or from different branches of the Illinois political tree; that's for sure. But in the time that he served on the court, over 30 years on the court, I really have come to respect him so much, and the role that he plays, the important role that he plays there.

And what I find interesting is a parallel outcome in you judicial careers. The first was from Justice Harry Blackmun, and Linda Greenhouse wrote this book that I've quoted from before. In

Justice -- at the end of his career, near the time of his retirement, made an observation about the death penalty, which he had supported throughout his term on the Supreme Court.

A case came along and he had this famous sentence, oft-quoted, "From this day forward," Justice Blackmun wrote, "I no longer shall tinker with the machinery of death."

He basically had reversed his position on the death penalty, after more than 30 years of service on the bench, when he concluded that it could not be applied fairly, based on his experience and all the cases that had come before him.

Justice Stevens had a similar epiphany in the case of *Baze v. Rees*, and he went through this long analysis of the death penalty and concluded as well that it was cruel and unusual, and he basically said, though it wouldn't affect the ruling in this particular case, that he believed that, at this point in his career, he could no longer support the death penalty.

You've had questions asked of you from this Judiciary Committee, when you came before us for solicitor general, about your position on the death penalty. And I think -- I know what your answer is going to be, and I'm going to give you a chance to put it on the record again. But then I would like to ask a follow-up question about Justices Stevens and Blackmun at the end of their judicial careers.

For the record, would you state your position on the death penalty?

KAGAN: Well, you're exactly right, Senator Durbin, that this was asked me during my solicitor general hearing and in the written questions that followed, and I said then what I'll repeat today, which is that the constitutionality of the death penalty generally is established law and entitled to precedential weight.

DURBIN: You...

KAGAN: I think somebody also asked me whether I had moral qualms about imposing the death penalty. This was in connection with my solicitor general nomination, so I think that the concern was whether, in any work as solicitor general, I could appropriately make decisions. And I said that I had no such moral qualms and that I could conscientiously apply the law as it was written.

DURBIN: Now I'll ask you to reflect on what happened at the end of the -- end of the judicial careers of Justices Blackmun and Stevens, where, after considering all of these death penalties throughout their time on the bench, death penalty cases, I should say, throughout their time on the bench, they came to the conclusion that we could not apply this law in a fair way without creating an unfair result.

What do you think led them to that at that point in their careers?

KAGAN: I don't know, Senator Durbin, and I would be reluctant to speak for either one of them. This is obviously a -- a difficult area of the law, an area in which there are great stakes and where people and judges feel their responsibilities in -- as very heavy, and appropriately so.

As I -- as I suggested to you, I do think that the constitutionality of the death penalty generally is settled precedent. I think even Justice Stevens agreed with that. He -- in those comments that he made, he suggested that he did not think it was appropriate to do what Justice Brennan and Justice Marshall had done, which was to dissent in every death penalty case. And he thought that that was inappropriate because of the weight of the doctrine of precedent.

DURBIN: When you clerked for Justice Marshall, his views on the death penalty were well known. And can you recall conversations with him on the subject when you were his clerk?

KAGAN: Well, they were well known. And Justice Marshall's clerks had, as a kind of special responsibility, and Justice Brennan's clerks as well -- clerks carry out the vision of the people for whom they work. And Justice Marshall and Justice Brennan did believe that the death penalty was unconstitutional in all its applications, but more specifically, I think, viewed themselves as having a special role in each death penalty case to make sure that there were no special problems in the imposition of a death penalty, and if there were, to bring those problems to the attention of the rest of the court to make sure that those issues would not be -- would not be missed or overlooked.

And the clerks for Justice Marshall and Justice Brennan, of whom I was one -- that was a significant part of the job.

DURBIN: And for the record, I mean, your position, as you view this issue, if you are confirmed and become the Supreme Court justice is -- would be different than that of Justice Marshall?

KAGAN: Senator Durbin, it would be, because I do believe that the constitutionality of the death penalty is settled precedent, going forward, and Justice Marshall did not believe that.

DURBIN: General Kagan, you've been nominated to replace Justice Stevens, who led the Supreme Court's effort to rein in the Bush administration's claims of executive power. The American people, I think, need have confidence that you, too, will stand up for our basic constitutional rights, if you come to conclude that the president has overreached.

The Bush administration took the position that the president has constitutional authority as commander chief to indefinitely detain an individual who provides support to a terrorist organization, even if the person didn't know or intend to support terrorism.

The administration infamously argued that a little old lady in Switzerland could be held indefinitely without trial for innocently making a donation to a charitable organization that she did not know was actually a front for a terrorist organization.

You discussed at length with Senator Graham, earlier, and Senator Feinstein as well, as solicitor general, you've argued the Obama administration position that the AUMF, authorization to use military force permits the detention of someone who provided substantial support to the Taliban, Al Qaida or associated forces, even if this individual is not on the battlefield and has not directly participated in hostilities.

This is obviously a change or improvement on the Bush administration position because it's based on congressional authorization, not presidential dictate. But I am still concerned that it is inconsistent with some of our treaty obligations, which only permit the military detention of battlefield combatants. A non- battlefield combatant who provides support for terrorism should be prosecuted and not subject to military detention.

You have argued the Obama administration's position on detention authority as solicitor general, but does this necessarily represent your personal opinion or how you would rule on its legality as a Supreme Court justice?

KAGAN: Senator Durbin, I think, in general, the positions that I've taken as solicitor general do not necessarily represent positions that I would take as a justice. And I appreciate your actually suggesting that point, in case I haven't emphasized it enough. The positions that I've taken as solicitor general are positions for the United States government...

DURBIN: Advocacy.

KAGAN: ... and are -- I have a client, and I'm the best advocate I possibly can be for that client.

KAGAN: And the role of a judge is different from the role of an advocate, and it is important to recognize that .

DURBIN: And in this particular area, the Supreme Court has not ruled on the legality of detaining an individual for providing material support to terrorism, is that not right?

KAGAN: The Supreme Court in Hamdi discussed only the detention of enemy belligerents who are picked up on the battlefield.

DURBIN: And in Hamdi, Justice O'Connor famously said "the state of war is not a blank check for a president." And the Supreme Court held that with certain due process protections, the U.S. may detain individuals who fought against the United States in Afghanistan as part of the Taliban.

The Supreme Court has not upheld military detention in the war on terrorism for anyone other than this narrow class of battlefield detainees, as I understand it. Is that the way you understand it?

KAGAN: Yes, your understanding is mine. That Hamdi talked only about enemy belligerents who are picked up on the battlefield.

DURBIN: That was one of the concerns I had with the nominations of justices Roberts and Alito in terms of their interpretation of the law in this particular area. As an appellate court judge, in Hamdan versus Rumsfeld, John Roberts held that President Bush's military commissions were legal even though they were created without congressional authorization and allowed the use of evidence obtained by torture.

The Supreme Court reversed Judge Roberts -- then Judge Roberts, holding that the military commissions violated the law. Incidentally, Justice Stevens was the author of that opinion. The Hamdan case was pending -- while it was pending, there was an extraordinary effort in Congress to force the Supreme Court to dismiss the case by retroactively stripping the right to habeas corpus from Guantanamo detainees.

As dean of Harvard Law School, you, along with the deans of Georgetown, Stanford, and Yale law schools, wrote a letter opposing that legislation. Could you tell me about that position and why you took it at that point?

KAGAN: Senator Durbin, I did write that letter. And it was a letter that urged Congress to -- really the principal point that we were making in that letter was that the adjudications made by military commissions ought to be reviewed in Article III courts.

And as Senator Graham and I discussed earlier, Congress did, indeed, do exactly that. The initial amendment was re-crafted into the Graham-Kyl-Levin Amendment. And it was really an extraordinary act of bipartisanship that occurred to -- I think it was -- the vote was 85 to 14.

And one of the things that that piece of legislation did was exactly what -- I'm not remotely suggesting cause and effect, but the letter urged that there be Article III review and the Kyl-Graham-Levin Amendment provide an Article III review of military commission determinations.

DURBIN: I bring this up because it has come up during the course of this hearing, raised by Senator Kyl and then in your discussion with Senator Graham. And there's one other element that should be mentioned. In *Boumediene versus Bush*, the Supreme Court agreed with your conclusion in that letter, even before the passage of this Graham-Kyl-Levin Amendment.

And it held that holding that it violates the U.S. Constitution to deny Guantanamo detainees the right to habeas. Justice Kennedy wrote for the majority, said "the laws and Constitution are designed to survive and remain in force in extraordinary times." And Justice Stevens, who was fifth vote in the case, and no surprise Chief Justice Roberts and Justice Alito dissented.

So even before the passage of this legislation by 84 to 14, the Supreme Court had agreed with the conclusion in that letter that you sent, which I think is a pretty good validation of the point that you were making.

I'd like to ask one other area that has come up here a couple of times. And my friend Senator Cornyn has left. But I know that his position is shared by many others on the other side of the table on this whole question that comes up virtually every hearing about this notion of activism and the role of a judge and the Constitution, particularly a Supreme Court justice and the Constitution.

And it strikes me there's something missing in this conversation. This notion of a mechanical court and robot judges, it just doesn't seem to me to reflect the reality of our system of justice and our history on the court.

And I will acknowledge, and I certainly wouldn't question Justice Cornyn's conclusion that he thinks *Brown versus Board of Education* had been well hidden in the 14th Amendment for a long time and was discovered in 1954. That it really was the original intention.

But for at least 60 years or close to 60 years, plus it was the controlling case on this. And said *separate versus equal* was acceptable in the United States when it came to our schools. I listened carefully to your answers and it sounds as if you agree with the concept that we have to stick within the Constitution, but you understand that within that Constitution, different conclusions can be reached.

Certainly that's what *Brown* teaches us. That in the same 14th Amendment they came to the opposite conclusion of *Plessy*. So can you -- for my sake, could you clarify the questioning of Senator Cornyn in light of that precedential case in *Brown*?

KAGAN: Well, Senator Durbin, I think -- I guess I would like to make two points and insist that they're not inconsistent with each other. The first point is that judges are always constrained by law. And that the only sources that judges can appropriately look to are legal sources. That judges can't import their own personal preferences or their political preferences or their moral values.

That it would be inappropriate to do so. That the role of a judge is to determine as best that person can what the law requires, and then to do that. That's the first proposition.

But the second proposition is that there are hard legal cases where people struggle with these issues, where people struggle with what the text and the structure and the history of the Constitution and the precedents that apply, the Constitution require in a given case.

And that can happen in the cases of the kind that you suggested in *Brown*. But it happens really all over the place. It happens not infrequently, I would say, at the Supreme Court level. Just because the Supreme Court is dealing with cases in which lower courts have disagreed.

So usually that the cases the Supreme Court hears are the hardest cases. Now sometimes the lower courts disagree and in fact the case is not so hard, and the Supreme Court decides 9-0. And, you know, it's all easy. But there is some very difficult cases which involve clashes of constitutional principles.

DURBIN: So let me -- if I can follow-through on one that I've not been able to raise, the Griswold case. Griswold versus Connecticut in the 1960s when the state of Connecticut was basically regulating the availability of family planning and birth control.

And this case challenged that law as to whether Connecticut had that right. And basically, the Supreme Court found a word in this Constitution which we can't find, privacy, and said that we have a right to privacy in our homes and families.

And some who analyzed it and took a look at Justice Douglas's opinion, writing for the court, were kind of stunned to see that he even went to the Third Amendment to say that that guaranteed a right to privacy, the right -- privacy in our homes.

Third Amendment, talks about quartering soldiers. But he referred to it during the course of that opinion. So could you put that decision of Griswold and privacy in the context of this explanation you're giving me?

KAGAN: Well, Senator Durbin, I actually think that Griswold and the holding of Griswold does have grounding in the constitutional text. And the way that most justices have thought about this is that the 14th Amendment, the due process clause of the 14th Amendment guarantees liberty, and that it guarantees -- when it guarantees such liberty, it means more than freedom from physical constraints, and it also guarantees more than procedural protections.

That there is some substantive protection of liberty that's incorporated within the 14th Amendment of the Constitution. And I think most justices on the Supreme Court believe that to be the case.

Now there are still very hard decisions about what that liberty consists of. I think most justices of the Supreme Court do at this point fully accept the Griswold holding, which suggested that a couple's ability to use contraceptives ought to be up to that couple. That the government could not appropriately interfere with that decision, consistent with the 14th Amendment's protection of liberty.

But -- but -- but the liberty clause of the 14th Amendment surely does give rise to some real disagreement in -- in -- in other cases, the extent to which that spear extends. And -- and those are, one -- but -- but not the only kind of -- of cases in which there are hard questions to be determined by the court.

Just another very different kind of case, which raised this to me recently, and -- I mean, it -- it shows the varying contexts in which these difficult questions involving constitutional principles can occur, is a case that I argued recently called *Holder v. the Humanitarian Law Project*, which involved this question of the application of the material support statute that Congress passed to combat terrorism as to certain kinds of expressive activity, certain kinds -- assistance to terrorist organizations that took the form of speech.

And -- and when I was arguing that case, I was subject to questions, and -- and the opposing lawyer also was subject to questions from all the justices, that all the justices clearly thought that this was an incredibly hard case because it involved very hard, but competing legal values, the value of free speech on the one hand and the value, really, of protecting and defending our country on -- on the other.

And, you know, that's a case in which this -- this clash of constitutional principles can occur, in which -- in which reasonable judges can -- can reasonably disagree about the results.

So -- so to say that something is law all the way down, which is absolutely the case, that it would be completely improper for a judge to import personal or moral or political preferences into the occasion, but that's not to say that law is robotic. That's not to say that everything is easy in the world of -- of constitutional law or, indeed, of statutory law.

DURBIN: Thank you very much, Ms. Kagan.

Thank you, Mr. Chairman.

LEAHY: Thank you very much.

And, Senator Coburn?

COBURN: Thank you. Am I next to last, Mr. Chairman, or last? Or what's our plan?

LEAHY: Well, let's see how we go.

COBURN: All right. Thank you.

Well, it's been a long day for you. Thanks for being here.

LEAHY: It's been a -- yes, and I'm concerned about the -- the witness and her stamina. Mine's...

COBURN: Her reputation says she's tough as nails. She can make it.

KAGAN: If you say so.

COBURN: First of all, you do get the Arthur Murray award. You are dancing a little bit, much to my chagrin. I would rather you not win. Maybe you should be on "Dancing with the Stars" or something.

I want to go, first, to a couple of -- a couple areas. One of the people I respect most in the Senate is somebody that's a polar opposite of me. His name is Russ Feingold. And he unabashedly stands for his liberal positions, defends them, doesn't run away from them, talks about them, and -- and stands up and beats his chest because he thinks he's right.

And I've never walked away from my conservative positions. I don't apologize for my social conservatism or my fiscal conservatism.

And one of the things I told you, I -- I want America to know who you are. And -- and, you know, you've kind of not allowed us -- you know, I don't know what a liberal-progressive is. I know what a liberal is, and I think you're a liberal. I think you're proud enough to defend that. And as Senator Graham said, there's nothing wrong with that.

But the point is, is you have a very different belief system than most of the people who come -- where I come from. And it's not wrong to have that belief system. It doesn't mean mine's right and yours is right, but it is wrong for us not to know what you believe about a lot of things.

You're very pro-choice. You believe in a woman's right to choose. You believe in gender mixed marriages or gay marriage. You believe that states ought to recognize those throughout. If I say something that is -- is inappropriate, please tell me.

KAGAN: Well, Senator Coburn, I suppose what I would want to say at this point is that the way I would vote as a legislator with respect to any or all of those issues is a very different...

(CROSSTALK)

COBURN: I'm not trying to -- I'm not trying to label as a judge. I'm just saying it's important -- I'm not saying you are not going to have the capability to separate those positions. I'm not saying that.

But it is important. I mean, you have -- you've told this committee that you think it's -- that there is appropriate time to use foreign law. You told this committee that in your solicitor general testimony, in terms of answers to questions.

KAGAN: Can I interrupt you on that one, too?

COBURN: I'll give you a chance. You're for -- you have made statements for assisted suicide, in terms of that being an appropriate thing. So I'm not saying that that will limit your ability to make great decisions as a jurist. And I want to separate that right now.

But I don't want us to -- the American people have a right to know what is make of Elena Kagan. There's all these other characteristics, too, smart as all get out, super accomplished, tough as nails. I believe you're tough as nails. I would not want to be a Supreme Court justice with you; I think I'd get run over.

You know, I -- I believe you have the intellect, superior intellect, and ability to reason. And I've listened to a lot of it here. But -- but -- but -- and, again, there's nothing wrong -- I love Russ Feingold to death, but we're totally different. And that's one of the things that makes our country great.

But it's not something that -- I don't want you to run away from that. That's who you are; that's what you -- you've fought for a lot of causes in your life. And -- and -- and those are a part of who you are. And a part of who you are will in some small instance influence your -- I don't know one judge that can 100 percent separate themselves from who they are as they make a decision, and I don't think anybody knows a judge that can do that.

So it's not unfair to say who you are. And -- and it's not a slam at all. It's just, you're different than me, and you're different than many of the people that I represent.

So I wanted to establish that. And I want to give you a chance -- if you want to say something in response to that, I'll be happy to give you that chance right now. But, you know, I'm a proud conservative. I'll fight anybody on the -- you know, I'm for it. I'll debate anybody about what I believe and why I believe it, and I think you would do the same, and that's one of the reasons I have admiration for you.

Do you have a comment about what I've said?

KAGAN: Well, I suppose a few comments, Senator Coburn. Let me take on just a couple of the particulars and then maybe make a more general comment.

You -- you said as solicitor general I advocated the use of foreign law in some circumstances. And I do just want to make clear that what I said in those -- those questions...

COBURN: Here's your quote, exactly...

KAGAN: ... was that, because there are justices on the Supreme Court who believe in the use of foreign law in some circumstances, that I would think it was appropriate as an advocate to argue from foreign law or to cite foreign law in any circumstance...

COBURN: Well, but that isn't what you said here.

KAGAN: Well, I think, Senator Coburn, with all respect, that if you look at the question and if you look at the answer, I was speaking in my role as an advocate, saying that the -- the primary consideration of an advocate is to count to five and to try to do the best the advocate can to ensure that the position that the advocate is taking will prevail.

COBURN: But it's not your position, because some other justices are using foreign law, you have the authority to do that, as well?

KAGAN: As an advocate, to the extent that I think that foreign law arguments will help the government's case, then I will use those foreign law arguments, is what -- is what I...

COBURN: Well, let me -- let me read something to you. As -- it's obvious I'm not a lawyer, OK? It's pretty obvious. But Article III, Section 2 says this: The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made.

Nowhere -- nowhere in our Constitution does it give the authority for any judge -- chief justice of the Supreme Court, any jurist on the Supreme Court or any other court -- to reference foreign law in determining the interpretation of what our statutes or our Constitution will be.

So this is an area where we have grasp, where our judicial maturity, much like the Israeli judge, that we -- we start reaching beyond the Constitution. You said it was all law. You -- you said the determination will always be law. It's down to law, law, law, the earliest questions that you were asked in this hearing.

Well, this is the founding document of what the law is. Nowhere that I can find in this writing or in these guys' writing says anything about using foreign law. So please explain to me why it's OK sometimes to use foreign law to interpret our Constitution, our statutes, and our treaties.

KAGAN: Senator Coburn, I think, for the most part, I wouldn't try to convince you of that, because I don't think that foreign law is appropriate as -- as precedent or as an independent basis of support in, you know, the vast majority of legal questions.

Now, I suggested to you a few that specifically might reference international considerations, such as, you know, the right to receive ambassadors or something like that. Even there I think the citations would not be a precedent, they would not have binding weight of any kind, but -- but -- but they might be relevant to interpretation of -- of -- of...

(CROSSTALK)

COBURN: Relevance is about getting knowledge and gaining knowledge, but there's a -- you have a different guide. The oath that you'll take as a justice of the Supreme Court is to uphold the Constitution and our statutes.

KAGAN: Well, I think I agree with you on that, Justice -- Senator Coburn.

COBURN: Don't worry. I will never get there.

(LAUGHTER)

All right. Let -- let me move on, then, if I -- if I -- if I may, if I can keep playing.

One of the things that you said today really concerned me, and let's see if I've got that. You were being asked a question, and you said, "But in other cases, original intent is unlikely to solve the question, and that might be because the original intent is unknowable or it might be because we live

in a world that's very different from the world in which the framers lived. In many circumstances, precedent is the most important thing."

Is the precedent more important than original intent?

KAGAN: Well, Senator Coburn, let me give you an example. I'm not sure if it was an example I used before or not. But in the First Amendment context, which is a context I've -- I've -- I've written about a good deal, it's fairly clear that the -- the First Amendment doctrine that's been established over 100 years departs significantly from the original intent of the framers.

And -- and here's one example, is that I think that the framers would never have dreamed that the First Amendment would in any way protect people against libel suits, that the First Amendment had anything to do with libel.

So when the court said in *New York Times v. Sullivan* that a public figure could not sue the *New York Times* and claim damages for libel without meeting a very high bar, without meeting the so-called actual malice standard, I think that that was something that the framers would not have understood. Now...

COBURN: Why would you think they wouldn't have understood that? I mean...

KAGAN: Well, I think that...

COBURN: I mean, they had -- they had print back then. I mean, we didn't start that early, in terms of formation of our country.

KAGAN: I think that this -- I'm sorry for interrupting. I think that the historic evidence is very clear that the framers didn't think that the First Amendment at all interfered with libel suits.

Now, over time, as -- as -- as courts have applied the First Amendment to different contexts, to different circumstances, have seen different factual problems, have had to consider different cases, I think that the court sensibly thought that the principles that are embodied in the First Amendment could not be protected unless -- unless the decision in *New York Times v. Sullivan* was issued, unless the...

COBURN: So let me go forward with that. Who can change precedent?

KAGAN: Well...

COBURN: Let's have a little law lesson here. Who can change precedent?

KAGAN: Well, the court can, but it's a very high bar.

COBURN: OK, I know. But they can, right?

KAGAN: It -- the court can change -- can overturn a ruling, but it's a very high bar. The precedent...

COBURN: What does a high bar mean to the average person watching this hearing today?

KAGAN: Well, that -- that -- that it has to be a very extraordinary circumstance or a very unusual circumstance for a court to overturn a precedent. And the usual circumstances that are mentioned are where the precedent has become completely unworkable, where it's clear that the precedent just is producing massively inconsistent results or becomes...

COBURN: So, for example, *Brown v. Board of Education*, that upset precedent, *Plessy v. Ferguson*, on its ear, didn't it?

KAGAN: It did, Senator Coburn. I think that...

COBURN: So what was the purpose in changing the precedent? Was it to change *Plessy v. Ferguson* or was it to go back to original intent? That's -- that's -- that's where I'm having trouble with what you said, because, you know, I know our framers weren't perfect, but I think their motivations were really pure.

And -- and for us to have a justice that says precedent is more important than original intent is going to give a lot of people in this country heartburn, because what it says is our intellectual capabilities are better than what our original founding documents were and so we're so much smarter as we've matured that they couldn't have been right. And -- and that's dangerous territory for confidence in the court.

KAGAN: Senator Coburn, I -- I think what I'm trying to say is that courts appropriately look to both kinds, both keys to constitutional interpretation, that courts appropriately look to original intent, that courts appropriately look to precedent, and that it depends on the provision of the Constitution, it depends on the case, it depends on the issue as to whether which -- as to which one of

those is most helpful and that it's a pragmatic approach, looking case by case to try to figure that question out.

And I think what I'm saying -- I would say two things about it. It's both extremely descriptive of what the court has done, that the court in...

COBURN: Historically speaking.

KAGAN: ... historically speaking and currently. And -- and the second point I would make is that, in fact, when the chief justice was sitting here, Chief Justice Roberts, he stated the same thing, the -- the same principle that I'm trying to state, is that one should approach the question of constitutional interpretation and -- and -- and pragmatically, without a single overarching theory, without something that says you always look to the specific original intent or you always look to something else, that sometimes the original intent controls and -- and -- and other times it may be an unknowable or it may be far removed from the current problems we face.

COBURN: So -- but that's -- but that's a judgmental decision, correct? You're -- you're going to make a judgment about whether original intent doesn't apply or is unknowable. And what may seem to be unknowable to you may be seem to be knowable to another judge, correct?

KAGAN: Senator Coburn, I don't disagree with you that judging requires judgment.

COBURN: Yes.

KAGAN: And...

COBURN: Well, that's the whole basis why we're having this hearing is, where's the judgment going to come from? Because it takes me to the next thing that you said that I have heartburn with.

I have great difficulty in -- in the ability to take off my advocate hat and put on my judge's hat. And my question to you is -- I would have the same problem, I will tell -- how are you going to take off your political hat?

What are the processes with which Elena Kagan is going to take off this advocacy of a liberal position in this country as she becomes a justice of the Supreme Court so that that advocacy hat is gone and only the judgment hat is left? How are you going to do that? You've already admitted you're going to -- you have trouble doing that now just from a solicitor general standpoint.

KAGAN: So, Senator Coburn, my -- the advocate's hat that I was referring to was not a political hat. It was the hat that I wear as solicitor general of the United States, representing the interests of the United States.

That has nothing to do with my own political views. It has to do with a long and historic tradition that the solicitor general's office has of representing the long-term interests of the United States government.

COBURN: Well, then let's move back to your political hat. How are you going to take that off?

KAGAN: Senator Coburn, that hat has not been on for many years.

(LAUGHTER)

Senator Coburn, I know that, you know, some people have said, "Oh, you know, she's a political person." I've had a 25-year career in the law. Of that 25-year career, 4 were spent in the Clinton White House. This was a period of time that I am proud of and that I feel as though, you know, I helped to serve the American people for President Clinton.

But this is by no means the major part of my legal career. The major part of my legal career has been as a scholar and teacher of constitutional and administrative law, has been, you know, teaching, by this point, many thousands of students, has been writing about constitutional and administrative law issues...

COBURN: Let me ask you another question then on it. And this is an enquirer. This is softball, OK? What do you say to...

KAGAN: You promise?

(LAUGHTER)

COBURN: I promise. What do you say...

KAGAN: Because it's getting late.

COBURN: You're terrific. What do you say to people who are worried that your political positions would influence your judicial opinions? What do you say to the average American that's sitting here watching this right now?

What -- what assurance and -- and -- other than knowing Elena Kagan, that, you know, we know who you are, we've met you, we've read about you, both positive and negative. What -- what are the assurances that you'd tell the American people is, "You can trust me to make a pure jurist decision that I'm not going to be biased"? What -- what is it that you would tell?

KAGAN: Well, I hope that they would listen to this hearing and come away with that view, come away with a person who believes that it's -- it's all about law when you put on a judge's robe. It's not about politics. It's not about the policy. It's all about law and making your best judgments about what the law requires.

And that is the pledge that I said was the only pledge that I would make yesterday, and -- and -- and I'll make it again now. But I think it's consistent with -- with -- with the way I've approached my life, in a fashion that respects the rule of law and a fashion that's temperate and respectful of other people's views, and, you know, with -- with respect, which I -- I don't think is partisan in the kinds of ways that a few people have suggested.

COBURN: You can understand why some of us -- when Justice Sotomayor told us -- you know, I mean, her words were, "I think I agree with you, Senator Coburn, we shouldn't use foreign law." And then one of her opinions, she's embracing the use of foreign law on a decision.

You know, we've become skeptical, because -- and as I said earlier and as I said on the floor speech about these hearings -- is, you know, it really isn't going to matter what you said, because once you're there, you're there, and we have very little ability to change it.

And so when we see histories and then we see statements that don't coincide -- and, quite frankly, you haven't done that to us, that I know of yet today. But you can understand the skepticism we might have, and especially in the fact that many on the other side of the aisle, the implication has been that the same thing by Alito and Roberts, that they weren't straightforward, that, in fact, they didn't keep their word on stare decisis.

So you understand what we're battling with, and that's why I'm not even sure the hearings are a great thing. I think we ought to do it the way we used to do it, is sit down, and talk, and spend a lot of time with you, and get a comfort level to where we feel like we really get to know you and what you believe and what your actions will be.

Let me go to one other thing. Senator Cornyn attempted to ask this, and -- and I think it's a really important question. If I wanted to sponsor a bill and it said, "Americans, you have to eat three vegetables and three fruits every day," and I got it through Congress, and it's now the law of the land, got to do it, does that violate the commerce clause?

KAGAN: It sounds like a dumb law.

COBURN: Yes, I got one that's real similar to it I think is equally dumb. I'm not going to mention which -- which it is.

KAGAN: But I think that the question of whether it's a dumb law is different from whether the question of whether it's constitutional. And -- and -- and I think that courts would be wrong to strike down laws that -- that they think are -- are senseless just because they're senseless.

COBURN: Well, I guess the question I'm asking you is, do we have the power to tell people what they have to eat every day?

KAGAN: Senator Coburn...

COBURN: I mean, what is the extent of the commerce clause? We have this wide embrace of the commerce clause, which these guys who wrote this never, ever fathomed that we would be so stupid to take our liberties away by expanding the commerce clause this way.

As a matter of fact, let me spend just -- I've got a little time. Let me just read you what they said, because they actually said, if the executive branch and the judiciary branch wouldn't enforce their limited view of the commerce clause, that, in fact, we needed to change the members of the Congress so that they would.

And let me read it to you. If it be asked what is the -- to be the consequence of Congress...

KAGAN: I'm sorry, Senator. Where is this from again? I'm sorry.

COBURN: This -- this is the Federalist Papers.

KAGAN: OK.

COBURN: OK? This is number 44. I presume you've read this book?

KAGAN: I have.

COBURN: I thought you might have.

KAGAN: It's a great book.

COBURN: It is. Actually, I hope you'll read it a lot as a justice, if you become one. Constitution, exercise powers not warranted by its true meaning. They're sitting there warning us to not do things. What are you going to do about it?

And I answer the same as if they should misconstrue or enlarge any other power vested in them, as if the general power had been reduced to particulars and any one of these were to be violated. The same, in short, is if the state legislature should violate their respective constitutional authorities.

In the first instance, the success of the usurpation will depend on the executive and judiciary departments. In other words, you become complicit in not slamming it down and saying, "Congress, you're going the wrong way."

And I would make the case today that we find ourselves in trouble as a nation because the judiciary and the executive branch has not slapped Congress down on the massive expansion of the commerce clause, which are -- which are to expound and give effect to the legislative acts.

And in the last resort, a remedy must be obtained from the people who can, by the election of more faithful representatives, know the acts of the usurpers.

So I go back to my original question to you. Is it within the Constitution for me to write a bill, having been duly elected by the people of Oklahoma, to say -- and get it signed by the president -- that you have to eat three fruits and three vegetables every day?

KAGAN: Well, Senator, first let me say about the Federalist Paper quote that you read, that it is absolutely the case that the judiciary's job is to, you know, in *Marbury v. Madison*'s famous phrase, to say what the law is and to make sure -- I think I've -- I've -- I've talked about it is -- as policing the constitutional boundaries and making sure that Congress doesn't go further than the Constitution says it can go, doesn't violate individual rights, and also doesn't act outside its enumerated authorities.

We live in a -- in a -- in a government in which Congress's authorities are enumerated in Article I of the Constitution, and Congress can't act except under one of those heads of authority.

Now, as I talked about with Senator Cornyn, the commerce clause has been interpreted broadly. It's been interpreted to apply to regulation of any instruments or instrumentalities or channels of commerce, but it's also been applied to anything that would substantially affect interstate commerce.

It has not been applied to non-economic activities, and that's the teaching of *Lopez* and *Morrison*, that the court -- that the Congress can't regulate non-economic activities, especially to the extent that those activities have traditionally been regulated by the states. And I think that that would be the question that the court would ask with respect to any case of this kind.

But -- but I do want to sort of say again, you know, we can come up with sort of, you know, just ridiculous sounding laws, and the -- and the -- and the principal protector against bad laws is the political branches themselves.

And -- and I would go back, I think, to Oliver Wendell Holmes on this. He was this judge who lived, you know, in the -- in the early 20th century, hated a lot of the legislation that was being enacted during those -- those years, but insisted that, if the -- if the people wanted it, it was their right to go hang themselves.

COBURN: OK.

KAGAN: Now, that's not always the case, but -- but there is substantial deference due to political...

(CROSSTALK)

COBURN: I'm running out of time. I want to give you another condition. What if I said that if eating three fruits and three vegetable a day would cut health care costs 20 percent, now -- now we're into commerce. And since the government pays 65 percent of all the health care costs, why -- why isn't that constitutional?

KAGAN: Well, Senator Coburn, I -- I -- I feel as though the -- the -- the principles that I've given you are the principles that the court should apply with...

(CROSSTALK)

COBURN: Well, I have a little problem with that, because if -- if we're going to hang ourselves, and as our founders, three of the critical authors of our Constitution thought the judiciary had -- had

a reason to smack us down, and as Oliver Wendell Holmes, if we want to be doing stupid stuff, we can do stupid stuff, I disagree.

I think -- you know, and that's not activism. That's looking at the Constitution and saying, well, we're going to ignore it even if it does expand the commerce clause, because the commerce clause is what has gotten us into a place where we have a \$1.6 trillion deficit, that our kids' future has been mortgaged, we may never recover from.

That's not an understatement at all. In 25 years, they're going to -- each of our kids are going to owe \$1,130,000 before they pay -- pay interest on that before they do anything for themselves or their kids.

So the fact is, is that we have this expansive clause, and we have to have some limit on it. And if the -- if the courts aren't going to limit it within the original intent, instead of continuing to rely on precedent of this vast expansion of it, the only hope is, is that we have to throw out most of the Congress.

And -- and -- but the point is, is their original intent is that you wouldn't ignore their original intent. And what we find ourselves today on the commerce clause is that with -- through a period of precedent-setting decisions, we have allowed the federal government to become something that it was never entitled to become, and -- and with that, a diminishment of the liberties of the people of this country, both financially and in terms of their own liberty.

KAGAN: Well, Senator Coburn, I -- I -- I guess a few points. The first is -- is I think that there are limits on the commerce clause of -- of the ones I suggested, which are the ones that are articulated, were articulated by the court in -- in -- in Morrison and in Lopez, which are primarily about non-economic activity and Congress not being able to regulate non-economic activity.

I guess the -- the -- the second point I would make is -- is I do think that very early in our history -- and -- and especially I would -- I would look to Gibbons v. Ogden, where Chief Justice Marshall did, in the first case about these issues, essentially read that clause broadly and -- and provide real deference to legislatures and provide real deference to Congress about the scope of that clause, not that the clause doesn't have any limits, but that deference should be provided to Congress with respect to matters affecting interstate commerce.

And -- and -- and I guess the third point is -- is just to say that I think the reason for that is -- is - is that \$1.6 trillion deficit may be an enormous problem. It may be an enormous problem. But I don't think it's a problem for courts to solve; I think it's a problem for the political process to solve.

COBURN: You missed my whole point. We're here because the courts didn't do their job in limiting our ability to go outside of original intent on what the commerce clause was supposed to be.

Sure, you can't solve the problem now, but you helped create it as a court because you allowed something other than what our original founders thought was a legitimate role for the federal government.

LEAHY: If the -- if the...

COBURN: I thank the chairman. I -- I will yield back. And I'll follow up on the next round.

LEAHY: Well, yield back. Your time is up. I didn't know whether you wanted to respond to that. Did you want to take a break before we go to some of the others or...

KAGAN: "Some of the others"?

(LAUGHTER)

If -- if it's "some of the others," I definitely want to take a break. If it's one of the others, we can do that.

LEAHY: Tell you what. Let's go to one of the others and see where we stand after that. Senator Cardin?

You're doing such a great job, we don't want you to leave.

CARDIN: Solicitor General Kagan, I'm one of the others, so let me welcome you to the committee.

I have been amazed and disappointed as to how the brilliant, trailblazing legal career of Thurgood Marshall has been portrayed by several of my colleagues.

Justice Marshall came from Baltimore, Maryland, the city where I was born, the state of Maryland that I have the honor of representing in the United States Senate. Justice Marshall was one

of the great Americans that have come from Maryland. We're very proud of what he's meant to this country.

It's interesting that this week, on July 2nd, we'll celebrate his 92nd birthday. And I must tell you, we've had a great deal of discussion about background. As you know, Justice Marshall was the great-grandson of a slave, and he grew up in a segregated country.

I talked during my opening statements about how I remember attending segregated public schools in Baltimore City. I also remember swimming pools, and theaters, and amusement parks that were restricted as to who could attend and who could -- could be there.

So we talk a lot about empathy, we talk a lot about background, we talk about how important that is. But on behalf of the millions of Americans who have benefited from Thurgood Marshall's public service, I'm glad he brought his real-world experiences to public service. He helped make a more perfect union and made a real difference in the lives of Americans.

I agree with the Legal Defense Fund in their release where they say, simply put, Thurgood Marshall helped make our union more perfect, and the legacy illuminates the highest possibilities for all Americans yesterday, today and tomorrow.

Now, Yesterday, I talked about how we can ensure that the public understands how important the decisions of the Supreme Court are in their lives and how I want American citizens to understand just how important what your role will be on the Supreme Court of the United States.

I'd just one more time express this concern about following legal precedent and activism. I listened to Senator Coburn, and I must tell you, I think his definition of original intent reminds me of some of my colleagues' definition of activism.

They use it for a particular purpose. Judicial activism is OK if you agree with the results. And I think that's the same thing with original intent. It's OK, if you -- if that's the result that you want.

But I want a justice who's going to follow legal precedent. I want a justice who believes that it's up to Congress to legislate, not the courts. I want a justice that is going to follow in the best traditions of protecting individuals against the abuses of government and special corporate interests. That's what I'm looking to.

It's very difficult for us to -- to -- to legislate -- to pass legislation to expand rights, and it's extremely frustrating when we finally get it done and then see the courts reverse legal precedent, reverse our congressional intent, and take away those rights that affect people of our nation.

So when we look at our Constitution and when it was created, citizens were defined very differently than they are today. Women and African-Americans were excluded from the definition of "we, the people."

But the real triumph of our Constitution is that we've overcome these faults.

Chief Justice Roberts said, "I think the framers, when they used broad language like liberty, like due process, like unreasonable, with respect to search and seizures, they were crafting a document that they intended to apply in a meaningful way down the ages," the same point that you have raised before this committee about times change and how does the Constitution apply to current circumstances.

The strength of our Constitution and the Supreme Court is that it advances rights and vision by the framers to current times.

Now, it's been a bumpy road on civil rights. We've made progress, and we have moved in a wrong direction. We've talked a lot about Plessy v. Ferguson. It might have been a pragmatic decision by the court at its time, but it was fundamentally flawed. There's nothing equal by separate, and we know that today.

Then came Brown v. Board of Education, one of the proudest moments in the history of the Supreme Court, indeed, one of the proudest moments in the history of the United States. The Supreme Court decision had real impact on real people's lives.

Your opening statement gives me comfort that you will follow in the best traditions of the Supreme Court in meeting the challenges of change.

You talked about a fair shake for every American. I'm going to mention that a couple times during our questioning. You also talked about the Supreme Court, of course, has the responsibility of ensuring that our government never oversteps its proper bounds or violates the rights of individuals, the fundamental opportunities America depend upon those goals.

Your grandparents and mine came to this country because of the opportunities this country enshrined in our Constitution.

In preparation for this hearing, I came across a Supreme Court case involving educational opportunity that you happened to be the clerk for the justice who wrote the dissenting opinion, Justice Marshall. In *Kadrmas v. Dickenson Public Schools*, Justice Marshall said that -- I'm quoting -- "today the court continues to retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives 16 miles from their school to use a school bus without paying a fee does not violate the 14th Amendment due process clause."

Now, I mention that because I think Justice Marshall was looking at factual circumstances that were not present 10, 15, 20 years ago, but trying to use current circumstances under our law to advance what we all believe was the framers' intent of "we, the people." How do you believe the framers intended the Constitution to provide for the protection of people against abuses of government or special corporate interest?

KAGAN: Well, Senator Cornyn, I think that the Constitution is a kind of genius document, in that, while certain of its provisions are -- are quite specific and -- and, you know, it just doesn't matter how times and circumstances change, we still have a Senate and we still have a House of Representatives and there's still elected the same way and -- and -- and all manner of things like that, that the -- the framers and then, in subsequent amendments and especially with respect to the Civil War amendments, the 13th and 14th and 15th amendments, wrote some provisions broadly, generally.

And this goes back to -- to what Chief Justice Roberts said in -- in that quote that you mentioned. And I think, actually, if I remember it correctly, Chief Justice Roberts said it would be wrong to give general provisions a cramped interpretation, that the point of these general provisions is to ensure that the -- that the principles that the -- that the framers held so dear or that the ratifiers of the 14th Amendment held so dear, that those principles would continue to apply throughout the ages for our posterity and -- and that so with respect to, you know, a number of ways in which the government can deprive people of equal protection of the laws or violate people's liberty.

CARDIN: Well, I -- I agree with that comment. Last year, the Supreme Court chipped away at the existing precedent in *Brown v. Board of Education*, so these are real concerns. I think the framers of our Constitution would have been proud of *Brown v. Board of Education*, even though at that time, as you know, African-Americans were -- were not included in the Constitution in the full sense.

But in that case of *Parents v. Seattle School District*, the court held that voluntary integration programs were unconstitutional, chipping away at *Brown v. Board of Education*. Justice Breyer, writing the dissent, said, "What happened to stare decisis?" I noticed Senator Cornyn talked about following legal precedent. Well, Justice Breyer was concerned about that.

He said, "To invalidate the plans under review is to threaten the promise of *Brown*. The plurality position, I fear, would break that promise. This is a decision that the court and the nation will come to regret."

Do you believe that decisions like *Brown v. Board of Education* are still relevant today and are precedent for the court to carry out what that court did in advancing "we, the people" for all?

KAGAN: Senator, I hope and I know that *Brown v. Board of Education* and the principles that *Brown v. Board of Education* set forth are still relevant today, and they're the principles that the equal protection clause has set forth.

And the idea of equality under law is a fundamental American ideal, a fundamental American value, a fundamental American constitutional value, and one of the court's most important missions is to ensure that that value remains strong over time.

CARDIN: Well, let me move on from education to voting rights on the civil rights agenda. It took a long time -- a lot of people worked hard, people gave up their lives in order that we have the right to vote, an expanded right of vote. Two constitutional amendments and even the -- the Civil Rights Act of -- of 1964 failed to address the hurdles to -- that used to exclude black voters and poor white voters, so Congress passed the Voting Rights Act of 1965.

So it was difficult for us to expand voting rights, and we have challenges today as to whether we can do what we have done.

There was just recently a Supreme Court decision of Northwest MUD that didn't directly deal with the issue of whether Congress has the right to -- to continue the -- the covered jurisdictions with preclearance, but it raises the question as to whether Congress has the constitutional power to protect minority voting rights.

So my question to you is, you had said several times, without reference to this specific issue, that you will give due deference to Congress. I want to put it in context to where we believe there is need to expand protection under our Constitution.

And will you give due deference to congressional actions where Congress is pretty clear? This is not where Congress is saying X and you know what X is. This is not substituting a Y for X, which I heard you say you don't believe is right. Will you give due deference to Congress where we are expanding protections under the Constitution?

KAGAN: Well, Senator Cardin, you raised the question of the scope of Congress's Section 5 power, Section 5 of the 14th Amendment, which gives Congress the ability to enforce the 14th Amendment, and -- and the scope of that power has -- has -- has been an issue in several recent cases.

In the case of *Burney* (ph), which I believe Senator Specter referred to earlier, the court said that it wanted to distinguish between Congress's ability to enforce -- to remedy 14th Amendment violations, and also to prevent 14th Amendment violations on the one hand, which was appropriate, and on the other hand, what the court found in *Bernie* was not appropriate was the court acting under that Section 5 power to change the constitutional rights that had been found by the court.

So that's the line that the court has developed in *Burney* (ph) and subsequent cases, which is Congress clearly has the authority to remedy and to prevent 14th Amendment violations, but doesn't have the authority essentially on its own to change the meaning of the 14th Amendment.

CARDIN: And I understand the point that was before the court. I guess my point is that voting restrictions today still exist. And we who are involved in the political system understand it directly.

KAGAN: Yes. And I should say, of course, the 15th Amendment has its own enforcement provision, and the Voting Rights Act was -- was passed under -- under that enforcement provision.

I think it's undeniable that the Voting Rights Act has been a major historical achievement for this nation. There, of course, may be a case that will come before the court on the question of the constitutionality of certain provisions or the Voting Rights Act generally.

That case, that issue was potentially before the court last year. The court did avoid it and resolved the case on statutory grounds. It was a case that the solicitor general's office filed a brief on in strong support of -- of -- of the Voting Rights Act.

But it's -- it's not likely to be the last time that the court will consider those issues. And I -- I -- I -- Congress clearly has an important role in this area, and the exact scope of that role is going to be addressed in future cases.

CARDIN: Thank you for that response. I find that comforting. I'd just point out that, you know, we lived through the election procedures, and we see obstacles in the way of voters.

In my own election in 2006, it was undeniable that the lines in the predominantly African-American voting places were three, four, five times as long as other communities, that there was targeted information sent out to tell voters in minority districts to -- to vote on Wednesday, rather than Tuesday. There were direct efforts made to diminish minority voting.

It exists today. And Congress is trying to take action in this area. And I'd just urge you, because voting is so fundamental to our system, that when Congress acts to try to expand rights, the statements you've made about deference to the congressional branch, I think, is particularly important.

Let me move to -- I just want to cover very quickly, because I know *Citizens United* has been covered over and over again here. But to me, it's a fundamental question, because voting doesn't mean much unless you have fair and open elections.

And President Lincoln said 100 years ago, "I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. Corporations have been enthroned, and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of people until the wealth is aggregated in a few hands and the republic is destroyed."

So I do worry about the impact of corporate contributions to the integrity of our election system. I chair the Helsinki Commission, which monitors human rights internationally. One of our principal objectives is to make sure we have free and fair elections in Europe, North America, and Central Asia. Well, my colleagues are now monitoring U.S. elections. They want to make sure, as -- as we have signed on to these accords, that -- that our elections are free and fair.

My point is that Citizens United, to many of us, is a step backwards. And, once again, Congress has acted in this area, and there's legal precedent. And I know this is a case that's already been decided and we're taking action, but I -- I just want to weigh in to say that I think it's critically important that -- that we -- that you follow when you can legal precedent and -- and -- and congressional dictate.

Let me just change to a different subject that is on everyone's mind today, and that's what's happening in the Gulf of Mexico. As the senator from a coastal state of Maryland, I am deeply concerned about the damages that have been caused to our environment, to -- to businesses, to individuals, the loss of life in the Gulf of Mexico.

Congress has passed environmental laws. Again, they weren't easy. We passed the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Safe Drinking Water Act, and Superfund.

Senator Feinstein questioned you as to the legislative intent that have certain areas covered in our wetlands, in which the Rapanos Supreme Court case was a huge step backwards, again, rejecting congressional intent.

And then, in Exxon v. Baker, we saw a restriction on the -- the full coverage of damages in the Exxon-Valdez matter. In my view, the court has weakened environmental protections that were hard-fought here in Congress.

Do you agree that the federal government, working with the states, have a unique role in protecting our environment and that the government must hold public lands and waters in trust for future generations? And will you give deference to Congress as we attempt to carry out that mandate?

KAGAN: Well, Congress certainly has brought authority under the Constitution to enact legislation involving protection of the environment. And I think that, when Congress enacts such legislation, the job of the courts is to construe it consistent with congressional intent.

CARDIN: Thank you. I also want to cover some employment cases, because I think, again, we're seeing a chipping-away of the rights. A couple of my colleagues have talked about the Gross case, which -- which the court rejected a long-standing test to deal with age discrimination in the workplace.

I could also talk about the Ledbetter case, in which the court on gender discrimination took the -- the test, which I find incredible to believe, that Lilly Ledbetter was supposed to know about her discrimination, even though it was impossible to discover it and she was barred by statute of limitations.

Now, we've corrected the Lilly Ledbetter case by further congressional action, but you talk about how we can make sure that every American gets a fair shake. Now, how do I explain to a 50-some-year-old woman with a couple of children who is fired after 25 years in the workforce because the employer wants to hire someone half her age and pay one-third her salary, how is she getting a fair shake, when the Supreme Court changes the test in order to avoid the current protections we thought we had in the law against age discrimination?

KAGAN: Well, Senator Cardin, I've pretty consistently said that I don't want to, you know, portrayed (ph) or, you know, give a thumbs-up or a thumbs-down on -- on particular Supreme Court cases.

I -- I do think that, with respect to any statute, discrimination statutes or any other, that the job of the court is to construe the legislation as Congress meant for the legislation to be construed. And that's difficult sometimes, but -- but -- but that's the goal, is to make sure that the court is -- is -- is not doing -- you know, deciding a case in a way in which, you know, it would like the statute to read, that the court is deciding the case according to the way Congress wanted the statute to be applied.

CARDIN: Well, thank you. I think that was a pretty complete answer.

And, by the way, I just -- I just really want to thank you for the complete answers you're giving us. In response to Senator Graham, you gave us high grades. I want to give you high grades on being responsive to the questions. I think you've been very direct where you can be. And I thank you for that openness to the committee.

I want to cover one other area of inclusion on -- on the -- on "we, the people," including all. Right now, in 30 states, an individual can still be fired for their sexual orientation or he or she have no recourse. An alarming 39 percent of the self-identified LGBT workers in America have reported some form of workplace harassment or discrimination, and yet they have no legal recourse in nearly two-thirds of our states. This is contrary to the legal expectation of fairness or, as you say, a fair share -- share for all Americans. And Congress has an obligation to stop this discrimination.

Now, there is a -- the state of Maryland has taken action, and I -- I congratulate our legislature and governor for -- for acting in this area. We have a similar effort pending in the Congress of the United States. And it has the support of 202 co-sponsors in the House of Representatives and 45 co-sponsors in the Senate. And I'm proud to be an original co-sponsor that would provide protection in the workplace for LGBT.

My reason for bringing this up is that we expect to pass this bill. It's not going to be easy, but we expect to get this protection passed. I am certain there will be a legal challenge. We usually find that the case.

Once again, do you believe that the -- to clarify the definition of "we, the people" so that all Americans are included in that and have protection of law? And, again, will you give deference to Congress as we try to create a more perfect union?

KAGAN: Well, the policy decision, Senator Cardin, is -- is -- is up to Congress. And the -- the -- the questions that might come before the court are questions if -- if they're statutory in nature, they would be appropriately addressed by the court asking what Congress intended.

CARDIN: Thank you. I wanted to save about five minutes at the end for somewhat easier rounds of questions, so you can catch your breath a little bit. You've been going all day.

So I want to talk about pro bono. And I want to congratulate you for your work at -- at -- at Harvard in expanding clinical experiences for your students, but I want to tell you the challenges we have.

According to recent Legal Service Corporation studies, each legal aid attorney serves over 6,800 people, while there's one private attorney for every 525 people in the nation. This is not equal justice under the law.

Recent studies have shown that every person who receives free legal assistance, at least one person is turned away due to lack of resources at the agencies, and this has only gotten worse as our economy has gotten worse. Many of the resources in which legal aid bureaus depend upon are the IOLTA funds, which, as you know, have -- have become much more difficult for legal service agencies to get.

So, unfortunately, today many low-income individuals are denied the opportunity for legal services, which is hardly equal justice under the law, which is what I think we all want to achieve.

And the type of cases they handle are like pregnant women who are being battered by their husbands, helping homeowners face foreclosure, allowing them to stay in their homes, helping employees who are discriminated against in the workplace due to race or gender or religious preference, helping people with disabilities, and those types of cases.

During my years I chaired the Maryland Legal Services Corporation, I helped to establish the clinical programs at Maryland Law School, which I found to be very helpful in training new lawyers who are sensitive to public service, but also providing a great deal of services for people who needed help.

So now looking around the country, 36 law schools have pro bono or public service requirements. As Dean Kagan, I know that you instituted major improvements of expansion in the law school clinics while at Harvard. Harvard law students must perform at least 40 hours of law-related public interest work, including working on behalf of people who cannot afford to pay for legal services.

Can you tell us just briefly a little bit about your experiences at Harvard Law School to expand the number of students participating in clinical programs and what impact that had on providing help to people who otherwise would not have received adequate representation?

KAGAN: Senator Cardin, this is one of the things I -- I worked hardest on at Harvard, along with a great many other people. And I -- I think we had some significant successes, which is good, because the need is so vast in this area, that there is so much need for legal services, you know, of all different kinds, of people who have housing problems or have employment problems or who have problems accessing health care in -- in ways that they need it, in all kinds of ways in which a lawyer can help them, and -- and -- and, you know, in -- in -- in which this -- this country should be able to work out a system in which such help can be provided.

And as you said, we very much expanded the clinical programs at Harvard during the time of my deanship. We also expanded the other kinds of pro bono opportunities open to Harvard Law School students. I think that the numbers are more than double the number of clinical placements during the time that I was dean, and -- and the pro bono work that was done by Harvard Law School students more than doubled during that time, as well.

So that 40-hour-a-week requirement that you mentioned -- 40-hour- by-graduation requirement that you mentioned, we had students who had performed 2,000 hours of pro bono by the time they graduated. And I think that the average amount of pro bono that was -- that was done by our students by the time they graduated was something like 500 hours, sort of 10 times the amount that we required of them.

And -- and I think that that's because what they discovered was this incredibly meaningful part of being a lawyer, that you can provide real services to people who need them, that -- that you can make a difference in the world, that you can make a difference in the lives of ordinary human beings.

And I think, you know, sometimes you can sit in a law school classroom and -- and not know exactly how it all matters in the world, and then you get into one of these clinics, and you do this kind of work, and you see how it matters, and you see how lawyers can -- can -- can truly benefit people.

CARDIN: The University of Maryland, I believe, is attracting a much higher level student today because of its clinical programs. Students want these opportunities. And I'm proud that you've -- I'm proud that we've instituted it in Maryland, and I think what you've instituted in Harvard also gives you a better diversity of student body that will help in the mission at the law school.

One last question, just very briefly. The ABA requires as part of our legal ethics to -- to participate in pro bono. How well do you think we're doing as a legal profession on -- on pro bono work? And what can you do as a justice to help advance these issues?

KAGAN: Well, we can -- we can surely do better. And -- and I think the justices -- you know, the question of -- of -- of what the justices say and -- and how the justices approach these big questions about the legal profession is something that I would want to talk with my colleagues about, if -- if the Senate sees fit to confirm me.

But I -- I -- I think that there's -- I think that there's got to be a role for Supreme Court justices, given the positions that they have, given the visibility that they have, to -- to try to work for appropriate -- to try to make sure that the practice of law, the legal profession really lives up to the ideals that it has.

CARDIN: Thank you, Mr. Chairman.

LEAHY: Thank you. Thank you, Senator Cardin.

Solicitor General Kagan, I've been involved in hearings either as a member or conducting them for 35 years of various judicial nominees. I can't remember anybody who's been asked such a wide variety of questions or answered them as forthrightly as you have. And I know it's been a long and tiring day.

I think the best thing to do for us, just break now, come back -- unless you want to override that?

KAGAN: No, that's good.

(LAUGHTER)

LEAHY: I -- I was going to -- I was looking there and I was going to say, "Don't call my bluff right now. I want to go home, too." But we'll -- we'll come back in here at 9 o'clock tomorrow morning.

I've had a lot of discussions with Senator Sessions, who -- who's actually wonderful to work with. I mean, he has -- he has to protect on his side, but we really do try to work on -- on schedules.

We -- because of the death of Senator Byrd and the changes that's made, it's also making changes on what we might do. It's one of the reasons why we went as late as we did, and I thank my colleagues on both sides of the aisle for being this helpful in that.

So please get a good night's rest. I'm going to try to do the same.

Senator Sessions, I hope you can, too.

And we stand in recess.

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