

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

JUNE 30, 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: All righty. Back to my day job.

(LAUGHTER)

The -- yesterday, the nominee answered our questions over the course of 10 hours. This morning, we'll complete the first extended round of questioning, in which all 19 members of the committee, Republicans and Democrats, ask questions for 30 minutes each.

And I would hope, after that, senators and the American people have a better sense of the nominee. I know I do.

Yesterday, we saw her demonstrate her knowledge of the law, as well as her patience and good humor. She consistently spoke of judicial restraint, her respect for our democratic institutions, and deference shown to Congress and judicial precedent.

So I urge senators to consider what additional questions they may feel they need to do in a second round. I've had several senators tell me they will not need their whole time, and I -- I do appreciate that, because we have a lot to do if we want to complete the nominee's testimony today.

And -- and I realize I've been pushing the schedule very hard. I appreciate the nominee's forbearance, but I also appreciate my good friend, Jeff Sessions, and his -- his willingness to work on this, because we have the memorial services for Senator Byrd. They're scheduled on Thursday, Friday and Saturday, and we have to figure out how we take those into account.

Jeff, did you want to add anything?

SESSIONS: Well, I know that you do have some challenges in working through the schedule. I want to work with you. We do not want to -- and cannot -- or in any way curtail the essence of this hearing, but we will definitely do what we can to be accommodating. And I hope then we can complete a full day about this in an -- in an effective way.

And I do hope that we can learn more about the nominee. We see her gifts and graces in many different ways. Those are revealed in her humor and -- and her knowledge.

But I think we -- some of the critics who are saying, "Who is this nominee? Exactly what do you believe?" might find it from the -- from the testimony difficult to know if -- if, Ms. Kagan, whether you'd be more like John Roberts and more like Ruth Bader Ginsburg.

So I think we need to know a little bit more what we can expect of you as a judge. And I hope today, as we go forward, maybe that will come through a little clearer.

Thank you, Mr. Chairman.

LEAHY: Thank you very much.

Senator Whitehouse, you're recognized for 30 minutes.

WHITEHOUSE: Thank you, Mr. Chairman.

Ms. Kagan, good morning.

KAGAN: Good morning.

WHITEHOUSE: Welcome back.

KAGAN: Thank you.

WHITEHOUSE: The questions that I ask judicial candidates usually begin with a description of what I view as the role of the judge, and I would ask you to agree or disagree, if you would.

I think that a justice of the Supreme Court, for instance, must decide cases on the law and the facts before them, that they must respect the role of Congress as the representative body, representing the American people, that they must not prejudge any case, but listen to every party that comes before them, that they must respect precedent and limit themselves to the issues that the court must decide.

Do you agree that those are the proper roles of a justice of the Supreme Court?

KAGAN: I do agree with that, Senator Whitehouse. It's what I tried to express in my opening statement on -- on Monday and in much of my testimony yesterday.

WHITEHOUSE: And on this matter of precedent, is it -- does precedent have an institutional role in the court, in terms of the separation of powers and the balance of power in the Constitution? Is it a means by which the court restricts itself from taking steps outside of proper bounds in areas best left to the more political branches of government?

KAGAN: Senator Whitehouse, I think that's said very well. The doctrine of precedent is, in large part, a doctrine of constraint that ensures that improper considerations, improper factors won't come into judicial decision-making, that ensures that courts will decide every case on the law.

It's also a doctrine of humility. It says that, even if a particular justice might think that a particular result is wrong, that that justice actually should say to herself, "Maybe I'm wrong, and maybe the greater wisdom is the one that's been built up through the years by many judges in many cases."

So precedent is a doctrine of humility, and it's very much what you said it is, a doctrine of constraint, a doctrine that binds courts and judges to the law.

WHITEHOUSE: And important within our notion of separated powers, since the other branches operate under the check of the United States Supreme Court, that the United States Supreme Court, as a court of final appeal, has no check on itself, and the question "Who watches the watchmen?" is very much pertinent to the Supreme Court or to any court of final appeal.

And it is in that context, is it not, that respect for precedent takes on this limiting, separated powers, constraining function in the very structure of our democracy.

KAGAN: Senator Whitehouse, that's -- that's correct. Respect for precedent and judicial restraint more generally are necessary for the reason you said, that the courts themselves have not been elected by anybody, there is no political accountability from the American citizenry, and there are precious few ways in which the legislature and the president can or should interfere with their function.

They ought to be independent, but that places on them a responsibility which is also to be restrained.

WHITEHOUSE: So if you look at some of the big decisions that have been controversial and contentious -- and I suppose one of the first would be *Brown v. Board of Education*, which created massive change across the country in our education system directed to take place with all deliberate speed, long overdue by many measures, but certainly a massively important decision in the lives of people across the country, that was decided by a court that was unanimous.

Roe v. Wade has perhaps been the most controversial decision the court has ever rendered. That was decided by a 7-2 court. In both of those cases, Republican appointees and Democrat appointees joined the majority and supported the decision.

And yet, when you get to the recent court, you'll see a different posture emerging. If you look at the Leegin decision as an example of a statutory case, that was the one you talked about yesterday, where the antitrust laws were changed by the court, the law didn't change at the time, nor did the precedent, correct?

KAGAN: As far as I know, the precedent has not changed under Leegin. But, Senator Whitehouse, you'll excuse me, I'm not an antitrust expert, so I -- I don't know whether there was any lead-up to Leegin.

WHITEHOUSE: But your testimony was that a new economic theory yesterday was what had driven the change.

KAGAN: I think that that is mostly what Leegin was based on.

WHITEHOUSE: Yes, and I agree with that. I don't contest that. What's interesting, though, is that throughout 96 years of precedent -- and it did so 5-4, with that group of five Republican-appointed judges driving the 5-4.

And, again, if you look at Heller, the Second Amendment hadn't changed. The precedent, by definition, had not changed. Heller changed the law, creating for the first time in 220 years a private right to bear arms that no previous Supreme Court had ever noticed. And again, that decision was done five to four with Republican appointees only, driving the law in a different direction by the narrowest possible margin.

So I guess I want to ask you what you think about all these five to four decisions and what effort the court should make to return to a collegial environment that the court, where even these highly contentious decisions, like Brown versus Board of Education and Roe versus Wade are driven either by unanimous or massive majorities of the court rather than the slenderest possible majority and to try to reach across the partisan divide on the court so it's not just Republican appointees acting together.

Is there -- should there be any desire or motivation on the part of that group of five to reach their scope a little bit more broadly for the sake of the court, for the sake of the country, for the sake of stability in the law, and not be so content with five to four decisions?

KAGAN: Senator Whitehouse, it's a hard question you pose, because on the -- on the one hand, every judge, every justice has to do what he or she thinks is right on the law. You wouldn't want the judicial process to become in any way a bargaining process or a logrolling process. You wouldn't want people to -- to trade with each other -- you know, you'll vote this way and I'll vote that way and then we can, you know, get some unanimous decisions.

WHITEHOUSE: But on the other hand...

KAGAN: Every judge has to do what -- what he or she thinks the law requires. But on the other hand, there's no question, I think, that the -- that the court is served best and our country is served best when people trust the court as an entirely non-political body, when -- when people look to the court has -- as doing what we know it ought to be doing, which is deciding cases that come before it on the best possible reading of the law.

And I think everybody ought...

WHITEHOUSE: And the court is capable of framing the decision that it makes in a narrower or more incremental way to attract a broader base of support on the court without necessarily engaging in logrolling or any of the behaviors that you thought -- that you think are -- are inappropriate. And I -- I don't contest that.

But there are ways to get to a larger majority without engaging in those, are there not?

KAGAN: Well, one of the benefits of narrow decisions generally, and there are a number of them, but one of the benefits of narrow decisions is that they enable consensus to a greater degree than broad, far-reaching decisions. And -- and that is generally a benefit for the judicial process and for the country as a whole to try to reach consensus on what it's possible to reach consensus on, consistent with the law.

WHITEHOUSE: But by definition, if the court were to reach beyond the group of five that has driven so many of these recent decisions, they would be less able to move the law as dramatically as they have. That's just obvious, is it not?

KAGAN: Senator, what has -- I want to make it clear that I'm not agreeing to your characterizations of the current court. I think that that would be inappropriate for me to do, and...

WHITEHOUSE: I understand that.

KAGAN: And I'm sure that everybody up there is acting in good faith. I -- I do believe that one of the benefits of narrow decisions, of approaching one case at a time and in each case trying to think of the narrowest way to decide the case, is to enable consensus. And consensus is in general a very good thing for the judicial process and for the country.

WHITEHOUSE: And the reverse of that is also true, which is that if you reach for a larger base of support in the court, you constrain yourself a little bit in how rapidly you're able to move the law in a particular direction, correct?

KAGAN: And I think what the judge should do is not to think about, you know, over the long haul I want the laws to move in this direction. I think what the judge should do is to take one case at a time and...

WHITEHOUSE: I know that's what you think.

KAGAN: Well, I can only tell you what I think.

WHITEHOUSE: That's right. But if you were looking for a signal from the court over what its intentions are, one very practical signal is that over and over again it's a court that is willing to make very important decisions by a five to four majority, rather than roll its decisions back, be a little bit more modest in the way it goes in its direction, and reach for a broader consensus on the court.

That's simply factually true, isn't it?

KAGAN: Well, Senator Whitehouse, such I'm going to insist again on not characterizing the court or any of the justices on the court and -- and just to say what I think is the right approach to judicial decision-making. And I think it is -- is -- the right approach is to take one case at a time, to not be looking down the road and trying to figure out in what direction the law generally should go and how that case is going to lead to another case or...

WHITEHOUSE: Hypothetically, if judges were there with a larger purpose or on a mission to direct the law in a particular direction, clearly, one of the indications of that -- or at least it would be consistent with that if there were a lot of five-four decisions, wouldn't it -- just as a matter of logic?

KAGAN: Well, I -- I don't think that -- what I most trying to make clear is that I don't think that any such agendas are the way anybody should conduct their business.

WHITEHOUSE: And I agree.

KAGAN: And...

WHITEHOUSE: Let me change the topic a little bit. What is -- what is the proper role of the court of appeal, court of final appeal in particular, with respect to making findings of fact? Whose provenance is making findings of fact?

KAGAN: Well, findings of fact are usually made in the district court, in the trial court, or with respect to other kinds of cases, of course, fact-finding can be done by Congress. But appellate courts do not make findings of fact, don't have the competence to make findings of fact, so for the most part rely on the findings of fact made in other institutions.

WHITEHOUSE: That was my thought as well. I spent some time doing appellate work, and my understanding was that particularly appellate courts don't do, and particularly supreme courts don't do findings of fact. They have the record before them, and that's the record that they have to follow, and it's the courts below that make the findings of fact.

So I was surprised in the Citizens United decision when the court concluded that -- and this is a quote -- "that independent expenditures, including those made by corporations, do not give rise -- do not give rise to corruption or the appearance of corruption."

And why do you suppose the court was willing to engage in that finding a fact, which I think all of us, who've had any political experience at all, not only find to be odd in the sense of it's a finding of fact he made by a Supreme Court, but also it's a finding of fact that in everybody's experience, who's been near an election, is actually wrong?

KAGAN: Well, I've talked before about my argument in Citizens United and, of course, it approached that argument as an advocate for the United States government, defending that statute and trying to defend it as vigorously as I possibly could.

And certainly, a large part of my argument was to urge the court to defer to Congress' very extensive fact-finding on this subject. And it was extensive. It occurred over many years and...

WHITEHOUSE: And it ran exactly contrary to this particular finding of fact made by the Supreme Court, did it not?

KAGAN: I -- I think that what the court was saying, on the other hand, was that this was a case in which political speech, paramount speech entitled to paramount First Amendment protection, was involved and -- and that the -- that the government had failed to show that there was a compelling state interest that was narrowly tailored to the restriction at...

(CROSSTALK)

WHITEHOUSE: I understand that; that was the holding of the court. But my focus is on this particular finding of fact that they made, which was, A, unusual and, I think, peculiar from a Supreme Court; B, factually wrong in everybody's experience who's been around election; and, C, actually, as you pointed out, directly contrary to the findings of fact that Congress had made in the 100,000-plus-page record that had been developed in prior cases.

So it's just interesting that they would make that finding of fact. Clearly, it's the core -- analytically the core finding of fact necessary to take the step that they made to say that Congress has no business limiting corporate spending in elections and corporations can spend as much as they please. If you want to go that way, this is the kind of finding of fact one would have to make.

So it concerns me that it's -- that it's there. And I would hope that if -- if you get to the court, you are more restrained in terms of making findings of fact at the Supreme Court level, particularly those that appear to diverge from the actual facts and from the congressional record that is the ordinary way in which these facts get to the court. And I assume that you would agree that -- to be modest with respect to findings of fact, as well.

KAGAN: Senator Whitehouse, I do think congressional fact-finding is -- is very important and that courts should defer to it. It doesn't mean that fact-finding is either necessary or sufficient. Sometimes Congress can make no findings of fact at all and the court should still to defer -- should still defer to -- to Congress.

And on the other hand, sometimes congressional fact-finding can't save a statute. But in -- in very significant measure, the courts should defer to congressional fact-finding. And they should do so because they should realize that it's Congress, rather than courts, that have the competence to engage in that kind of fact-finding, to develop evidence, to call witnesses in support...

WHITEHOUSE: The rule, in fact, is nearly absolute. I mean, really, the only time when it's OK for a court to make a finding of fact is when it goes to the point where a court can take judicial notice of something as a completely uncontested baseline fact. Isn't that the law in this?

KAGAN: Courts in general have neither the competence nor the legitimacy to do fact-finding in the way that Congress can do fact-finding.

WHITEHOUSE: So to go back to my premise, which you don't accept, and I -- this is just, you know -- I understand that that's the frame of our discussion, that there may be judges on the court who have a particular mission right now and are selectively knocking out precedent that does not coincide with their ideological views.

If one wished to continue to do that -- assuming my premise to be true -- I know you don't accept it -- but assuming my premise to be true -- if there were judges who had that point of view and were on a mission to move the law in a particular direction and wanted to continue to do it, it strikes me that one way that they would try to continue to do that would be to try to create an analytical method or analytical machinery that supported the continuing effort.

And in that regard, I was interested in Chief Justice Roberts' concurring opinion in Citizens United, where he talks about precedent that actually impedes -- this is his quote -- "actually impedes the stable and orderly adjudication of future cases."

I think through the whole hearing we've had sort of a baseline premise in our discussions with you that precedent is what precedent is. It's been decided. You don't have an opinion as to whether you like it or not. It's the precedent, and you're bound by it.

But here's the chief justice saying that some precedent actually impedes the stable and orderly adjudication of future cases. And here's how you find out what that precedent is, according to the chief justice, in his concurring opinion: when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases.

Now, if that's a theory of precedent, does that not allow a determined group of judges on the court to hotly contest precedent that they don't like and gradually undermine it until it reaches the point that it is so hotly contested that it cannot reliably function as a basis for a decision and they can now topple that precedent as impeding the stable and orderly adjudication of future cases?

Analytically, setting aside the fact that you disagree with my premise, analytically, isn't that the way that works?

KAGAN: Senator Whitehouse, I think that the chief justice was not the first in that opinion to make the argument that, if a precedent is hotly contested, in his words, has been subject to very continuing disagreement and dispute, that that weakens it as a precedent.

Now, other courts at other times have said the opposite, that that should -- that should not function as -- as -- as a reason to weaken the precedent. So I think that there is -- even prior to the chief justice's statements, I think that there are competing statements, competing views on this question. I think...

WHITEHOUSE: I understand that. But my point is that, if you were a judge who wished to go out and selectively undermine and topple precedent that you did not agree with, because you had a particular point that you wished to drive the law towards, isn't this a very useful doctrine, because you are now in a position to hotly contest the precedent that you don't like and use your own disagreement with it to undermine it and take it down?

Isn't, in that sense, a doctrine that we should regard with some caution, given the role of precedent as a limiting factor in the separation of powers and the very balance of power of our government?

KAGAN: I do believe, Senator Whitehouse, that it should be regarded with some caution. I think that the stronger reasons and the reasons that the court more frequently relies upon to reverse precedent has to do with its workability and has to do with whether either legal doctrine or empirical facts have eroded the precedent.

I do think that the chief justice made some points with respect to those issues, as well, in his concurring opinion. But in any event, I think that those are the two -- the -- the two more standard bases for deciding that a precedent really does have to be reversed.

WHITEHOUSE: The -- I think it was Senator Cornyn on the other side who said that -- to use his words, I think -- it would be a strange system, indeed, if our system allowed for precedent to be disrespected and become not binding any longer, and it strikes me that this system where judges on the court can continue to hotly contest precedent they don't like, undermine it, and topple it meets that strange system, indeed, standard.

Let me turn to the question of the jury. I spoke about that in my opening remarks briefly.

Again, back to the Constitution, if you set up the various institution of government, here we are, the Senate, one of the institutions of government, engaged in our advice and consent to a nomination by the president of the United States, another institution of government, for a nominee to the Supreme Court, a third institution of government, another institution that is repeatedly referenced in the Constitution and Bill of Rights -- three times total -- is the jury.

Could you comment on the extent to which the jury was seen by the founders as an institution of government, as what de Tocqueville called a mode of the sovereignty of the people?

KAGAN: I think it was, Senator Whitehouse. You know, we -- we learn about the separation of power system and how the three branches of government are designed to check each other, but the framers also had a very strong view that there was another check in the system, and that check was the people, and that the institution that the people often functioned as part of was the jury. And to the framers, the jury was an extremely important mechanism in -- in checking the other branches of government.

WHITEHOUSE: Because they had seen corrupt colonial governors and were suspicious of executive power, were they not?

KAGAN: That's my understanding, Senator Whitehouse.

WHITEHOUSE: And they had seen the power of the early legislatures. I think Thomas Jefferson said, "We've traded in one tyrant for 237," once he saw the Virginia Assembly begin to act, and that's why they had to go back and design the balanced system of powers.

WHITEHOUSE: And they were sympathetic to press attacks, so they could imagine an individual who the governor was predisposed against, who was in the pockets of the enemy of this individual. They could imagine the individual be on the wrong side of the general assembly or the legislature. They could imagine the -- an individual who the owners of the paper had turned on and were marshalling public opinion against.

And I believe that they wanted to create one last sanctuary where all of that money, power, influence and public opinion would not hold sway, and that's why they established the jury, with regular citizens. And we protect it with laws that make tampering with the jury a crime. Do you agree?

KAGAN: I think, Senator Whitehouse, that the jury was an extremely important mechanism to the framers and that it was a mechanism designed to check other institutions of government.

WHITEHOUSE: As sort of a last -- when everybody else is gone, you can -- you can still get a fair hearing in court before the jury.

KAGAN: I think certainly the framers believed in an independent judiciary generally, and there's no question that within the judicial branch they thought that the jury played a very significant role.

WHITEHOUSE: So when the Supreme Court threw out the Exxon punitive damages award of \$5 billion, just one year's profits for Exxon, when they ran the tanker aground in Prince William Sound, and did so on the basis, in part, of predictability for corporations, there was a clear value judgment there, with considerable history and constitutional law and original intent surrounding the jury on the one side of that equation, and the convenience and predictability of corporations -- for corporations -- on the other side of that equation. Correct?

KAGAN: Well, I do think the court in Exxon was struggling with values on both sides. I would agree with that.

WHITEHOUSE: And in that particular case, the institution of the jury lost and the predictability for corporations won.

KAGAN: In that particular case, the court held under a kind of a maritime common law that punitive damages could go...

WHITEHOUSE: No higher than...

KAGAN: ... no higher than...

WHITEHOUSE: ... compensatory damages.

KAGAN: ... compensatory damages.

WHITEHOUSE: Because otherwise it became unpredictable for corporations.

KAGAN: Became unpredictable, that there was no stability in the system.

WHITEHOUSE: Correct.

Thank you for our time together. I wish you well. And I appreciate how well and with what good humor and how openly you have answered all of our questions through this long ordeal.

KAGAN: Thank you.

WHITEHOUSE: Thank you, Mr. Chairman.

LEAHY: Thank you, Senator Whitehouse. And thank you for the time you spent on this.

And, Senator Klobuchar?

KLOBUCHAR: Thank you very much, Mr. Chairman.

Solicitor General Kagan, you did -- had an incredibly grueling day yesterday, and did incredibly well. But I guess it means you missed the midnight debut of the third "Twilight" movie last night.

(LAUGHTER)

We did not miss it in our household, and it culminated in three 15-year-old girls sleeping over at 3 a.m. So I have this urge to ask you about the...

KAGAN: I didn't see that.

KLOBUCHAR: I just had a feeling. I keep wanting to ask you about the famous case of Edward versus Jacob or the vampire versus the werewolf.

KAGAN: I wish you wouldn't.

KLOBUCHAR: But I will refrain.

I know you can't comment on future cases. So I'll leave that alone.

I read a few weeks ago this article that I thought was good in The Washington Post by Donald Ayer, who is the former deputy solicitor general in the Reagan administration, and he talks a lot about what he thinks these hearings should be about. But he also makes some references to the balls-and-strikes analogy.

And as you know, when Chief Justice Roberts was nominated to the Supreme Court and sat in the seat you're currently in, he famously told this committee that judges are like umpires: Umpires don't make the rules, they apply them. He said that it was his job to call balls and strikes.

And I was wondering if you could just talk about that metaphor. Do you think the balls-and-strikes analogy is a useful one, and does it have its limits?

KAGAN: Senator Klobuchar, I think it's correct in several important respects. But like all metaphors, it does have its limits. So -- so let me start with the ways in which I think it's an apt metaphor.

The first is kind of the most obvious, which is that you expect that the judge, as you expect the umpire, not to have a team in the game. In other words, not to come onto the field rooting for one team or another. You know, if the umpire comes on and says, you know, "I want every call to go to the Phillies," that's a bad umpire.

And is that your team?

(LAUGHTER)

KLOBUCHAR: Not exactly. The Twins. The Twins.

KAGAN: I was pointing to Senator Kaufman, I'm sorry.

And same for the judge.

So, you know, to the extent that what the umpire suggests, that there's got to be neutrality, that there's got to be fairness to both parties, of course that's right.

The second thing that I think is right about the metaphor, and I think that this is what the chief justice most had in mind, if I remember his testimony correctly, is that judges should realize that they're not the most important people in our democratic system of government.

They have an important role. Of course they do. We live in a constitutional democracy, not a pure democracy, and judges have an important role in policing the constitutional boundaries of our system and ensuring that governmental actors, other governmental actors don't overstep their proper role.

But judges should recognize that that's a limited role, and that the policymakers of this country and that the people who make the fundamental decisions for this country are the people and their elected representatives, whether in Congress or in the executive branch.

And I think that that's right, too, as I've tried to say on many occasions throughout these hearings.

I suppose the way in which I think that the metaphor does have its limits, and I believe that this is in line with what Mr. Ayer was talking about, was that the metaphor might suggest to some people that law is a kind of robotic enterprise, that there's a kind of automatic quality to it, that it's easy, that we just sort of stand there and, you know, we go ball and strike, and everything is clear-cut, and that there is -- that there is no judgment in the process.

And I do think that that's not right. And it's especially not right at the Supreme Court level where the hardest cases go and the cases that have been the subject of most dispute go.

And as to that, I think that there is -- judges do, in many of these cases, have to exercise judgment. They're not easy calls.

That doesn't mean that they're doing anything other than applying law. I said yesterday on a couple of different occasions, it's law all the way down. You know, you're looking at text. You're looking at structure. You're looking at history. You're looking at precedent. You're looking at law, and only at law, not your political preferences, not your personal preferences.

But we do know that not every case is decided 9-0, and that's not because anybody's acting in bad faith. It's because those legal judgments are ones in which reasonable people can reasonably disagree sometimes.

And so in that sense, law -- law does require a kind of judgment, a kind of wisdom. And there are frequently clashes of constitutional values. Senator Whitehouse talked about one such clash. But

there are many of them. And judges have to, you know, listen to both sides and cast each argument in the best possible light. But sometimes they're not going to agree.

KLOBUCHAR: And one of the things he says in this article, he makes that point and talks about how these hearings should actually focus not on what he calls the simple cleverness and ability to score debater's points, but of greater relevance when you look at the whole universe of trying to make decisions between plausible alternatives on different cases.

He says, the greatest relevance for a nominee is a demonstrated history of good judgment and prudence in life, as in legal work. And he makes the argument that that should be the focus of those hearings.

So along these lines, I'm going to just ask some of your work experiences and how you think that they help you to be a better judge, and what you bring to the bench because of that.

KLOBUCHAR: Senator Schumer had asked you about your work as dean of Harvard Law School. And you said the thing you learned most from that was listening. And I wondered, how will that experience -- beyond listening, even, what will you bring from that experience to the bench? And what lessons have you learned that will make you a good justice?

KAGAN: Well, Senator Klobuchar, I'll start by just saying that listening was -- was the most important lesson.

It was -- I was so struck when I read this statement by Justice Stevens about understanding before disagreeing. And he had said that about the justice whom he clerked for. And I thought, you know, that's about the best thing that you can say about a person, that the person does listen and try to understand things from the other point of view before deciding to disagree. And you know, maybe deciding not to disagree, because of the listening and the understanding that's taken place.

So that's a -- a hope, something that I had to learn a little bit during my time (inaudible). But I guess otherwise, you know, Mr. Ayer said prudence and judgment. I do think that when you run an institution with, you know, many, many employees with a -- with a big budget, with just, you know, lots of the kinds of problems that any person who runs a business or runs an organization just knows the wide variety of things that come across your plate every day, and, you know, you exercise a lot of muscles when you do something like that. And they're muscles that I have never exercised before, and it gave me grounding in a lot of things that I otherwise would not have had grounding in.

And it made me, I think, you know, very aware of other people, I think, in a way that I wouldn't have been had I been just a professor all my life, because so many people come to your office with just life problems. And you get exposure to, you know, so many different sorts of issues that people are struggling with and that people are confronting in their lives. And it becomes a little bit your life, too. And -- and -- and, you know, I hope that that made me a better person.

KLOBUCHAR: You know, as solicitor general, you got to actually argue cases before the Supreme Court, and how has that experience informed your appreciation for oral argument and what you think are good oral arguments, bad, what techniques do you think work?

KAGAN: Well first, I'll say that it's -- it's very much deepened my appreciation of the court itself. And I hope that this was something that I conveyed in my opening statement, is that you go up there, and you get to the podium, and there are nine people, and every single one of them is so prepared to talk about the case, so into the case, so engaged, obviously so smart, and -- and so, I think, trying to get it right. And -- and so I developed a real appreciation for the court through those oral arguments.

What do I think is a good oral argument? I think -- I think you have to answer the judge's questions. I think they're impatient when people try to give speeches or when people go up to the podium and just try to make their points -- "I have four points I want to make, I'm going to make those points again and again and again." And -- and the justices, I think, they have the briefs. They've read your briefs, and you know, the striking thing is that they really have read your briefs. They know your briefs.

So they don't want to hear you repeat your briefs. What they want to hear you do is respond to their questions, and I think good advocates know that, and they know that even if it means going down a road that, you know, their great points are in some other direction, but it makes sense to go down the road that the court wants you to go down because that's what the court is interested in. And it's only if you address the justices' real concerns that you're going to win your case.

KLOBUCHAR: So if you are confirmed, then we will consider those tips for those that go before you.

The other thing I want to get to back to this judicial philosophy piece of what we were talking about here, and that is just back to the masters thesis you wrote. I know it was before you were in law school, as you and Senator Grassley discussed. But in that thesis, you wrote that Supreme Court justices live in the knowledge that they have the authority, either to command or to block great social, political and economic change. At times, the temptation to wield this power becomes irresistible.

What in your character or your experience will help you deal with this temptation when you're on the bench?

KAGAN: Well, I -- I again want to say what I said yesterday is that let's just throw that piece of work in the trash, why don't we? You know, that it was something that I wrote before I went to law school and didn't know much, didn't understand much about -- about law and certainly about the way judges should work.

I -- I -- I just think every judge just has -- has to be committed to the kind of principles of restraint that I was -- that I -- that I've tried to talk about in this hearing. And every judge has to realize that the people of this country get to make the fundamental decisions about this country.

And I do think that my experience working in other branches of government, in the executive, and working a good deal with Congress, will remind me of that if anything were needed to remind me of that. Because what I did take away from those experiences was really a profound respect for the political process and for how policy decisions are made. And they -- not every single one of them looks pretty.

And of course, no single person is going to agree with every result that comes out of Congress or any other political institution. But I do believe that there is real wisdom in the American people, and that wisdom gets channeled through institutions like this one, and that in the main we are well served by our political institutions. And that even when we're not, it's just not up to courts to correct that.

So -- so, you know, I think that the experiences that I've had in government are good reminders of just the importance of the democratic branches of our government in making the fundamental policy decisions that affect our country.

KLOBUCHAR: Good. The other part of your job will be to write opinions, and in a 1996 article on the First Amendment, you discussed a case actually from my state, *RAV v. City of St. Paul*. And you noted that Justice Stevens criticized part of the Supreme Court's approach in that case, characterizing it as, quote, "an adventure in a doctrinal wonderland."

How, as Justice Stevens' successor, would you work to make sure the Supreme Court's opinions are both well-grounded and accessible to the general public?

KAGAN: Senator Klobuchar, I think -- I should say it's an important question. I'll just say I think in the end I disagreed with Justice Stevens more than I agreed with him...

KLOBUCHAR: Right.

KAGAN: ... in that opinion. But I -- but -- but, I do think it's sometimes a fair criticism, the criticism that Justice Stevens made. And it suggests something about maybe some decisions' lack of connectedness, the sort of facts on the ground. And I would say two things about that. I mean the first is that courts have to be really attentive to the facts of the case -- that courts can't be sort of spinning legal doctrine irrespective of the facts in a case that have been presented to them.

Because the whole idea of courts in our system is courts aren't deciding abstract legal questions. They're not just sort of philosophizing about proper legal approaches. They're deciding actual cases and controversies. And what it means to decide an actual case or controversy is to think about the application of law to facts, and what that requires is that you really understand the facts, that you really -- that you delve through the record, that you get your absolute best sense of what the actual conditions and circumstances of the parties are. So that would be the first point I would make.

I guess the second thing is actually that even going beyond that, that it's often an important part of principle of judicial decisionmaking to take into account the actual consequences of a legal rule. And this appears in a number of different areas. I'll give you one, which is procedural due process,

the 14th Amendment, where we're more used to talking in these hearings about the substantive due process aspect of the 14th Amendment.

But the procedural due process aspect is very important. It's the set of requirements that say when an individual comes and challenges the government, says the government has denied me some benefit, that the government owes me, the question is what procedures is that person entitled to make that challenge.

And the -- the test the court use -- uses is a very practical one.

KAGAN: It says, "Well, if we gave you more procedures, how much would that increase the accuracy of our determinations?" And also, "If you were wrongly deprived of some benefit, how much would that hurt you?"

And, also, "What's the burden that these procedures are likely to impose on the government? Like, what's the actual cost that the government is going to have to incur?"

And it balances those things. And that's an example of how in some areas the court has -- and I think has appropriately -- looked to the real world, the practical effects of a particular legal rule.

KLOBUCHAR: So you're not talking about driving a result. You're talking about how the results -- knowing what the results could be, should be considered?

KAGAN: Yes, you're totally not talking about driving the results. This is anything but a results orientation in the way people sort of think, oh, I want this side rather than that side to win. That's inappropriate in every and all circumstance.

But -- but there are places in which the legal doctrine and even the constitutional doctrine does take into account practical effects.

I mean, just another quick example is Fourth Amendment search and seizure cases, where the Constitution speaks of unreasonable searches and seizures. And one of the things that the court takes into account in deciding what's a reasonable search and seizure and what's an unreasonable search and seizure is some practical impacts on -- on the people who are searched, but also very much on -- on the police.

You know, how can we create a set of -- you know, how can we create a doctrine that the police will find to be workable so that they'll know when to search and when not to search, when they have to get a warrant and when they don't have to get a warrant?

KLOBUCHAR: Well, and along those lines, last year the Supreme Court decided, as you know, *Melendez-Diaz v. Massachusetts*, a case about the confrontation clause in the Sixth Amendment, and the court held that it violated the confrontation clause for a prosecutor to submit a chemical drug test report without the testimony of a forensic scientist.

It was 5-4 decision. It didn't split among -- among ideological lines. And I was concerned about the decision, just because, again, as a practicality of how all this would work for prosecutors.

And actually, this year the Supreme Court, in another case, *Briscoe v. Virginia*, which raised the same question, and I was hopeful that the court might limit *Melendez-Diaz*. Twenty-six attorney generals, including the attorney general of Minnesota, chimed in, explaining that it was already negatively affecting drug prosecutions in some states.

And, actually, a solicitor general in the *Briscoe* case, you submitted an amicus brief that supported the position of the state. And I thought you could discuss this, elaborate on the position, and why you think it's important if you look, because I figure you're not going to be able to get involved in this case if you're a justice, but just if you could talk about the results and what could happen with a case like this.

KAGAN: Well, I won't be able to get involved in -- in this case. I'm sure that there are other issues that will be coming down the road about the confrontation clause. I'll try to steer clear of that.

As you say, Senator Klobuchar, the United States government did file a brief in that case, and it -- it supported the, whatever it was, 26 or 27 states which were concerned about the effects of the court's prior ruling on law enforcement. And particularly, we're concerned about the ability of -- of -- of governments to present evidence -- this was evidence of drug-testing -- without going to great expense and burden to get every lab analyst into the courtroom.

KLOBUCHAR: Right. I think in Virginia, the statute said they could bring them in if there was a question, if it was disputed, but if it wasn't disputed, they didn't have to bring the lab analysts in.

KAGAN: That's...

(CROSSTALK)

KLOBUCHAR: And that -- and the -- and the Supreme Court decided not even to go into that and say, well, that would be fine, I think what happened.

KAGAN: Yes, I think that the -- the court just remanded the case back to the lower courts to decide it and decided, you know, not to say anything more about this issue in that case. We have -- the government had urged them to do so because of the kinds of -- of -- of practical issues you raise.

I think, you know, the -- the -- the court's analysis now in this area does not focus on -- on those practical questions. The court's analysis simply asks, says, is the evidence in question testimonial, which an affidavit from a drug analyst would be?

And if it's testimonial, the only way in which it can be admitted in court is if the person who has made the affidavit, who has written the affidavit, is unavailable and was previously subject to cross-examination.

So it's -- it's a pretty bright-line rule, and it -- it has had the effects on states that you mentioned. But it is -- the -- the approach is now settled law.

And I will say -- I will say one thing about this. I think it sort of suggests something different about the judicial process, that -- that is a point I've been trying to emphasize. I think that the -- the justice who has been primarily responsible for this understanding of the confrontation clause -- and it is an understanding of the confrontation clause that -- you know, that works well for criminal defendants...

KLOBUCHAR: That's a nice way of saying it.

KAGAN: Yes, I mean, criminal defendants love this rule. Prosecutors do not like this rule. The -- the person who has been most responsible for this approach is -- is -- is, I think, Justice Scalia.

And I don't think that Justice Scalia is any great fan of, you know, if you gave him a criminal defendant and gave him a prosecutor and said, "Choose," I don't -- you know, I -- I think we know which way he'd choose.

I think it's actually a good example of where a -- a person's view of the law comes out a different way from, you know, where -- which -- which party they might want to have win, and that's a great thing for a judge to -- to do.

I mean, all judges, that should -- that should happen in their lives, that -- that their view of the law leads them in a direction, which, you know, if they were a legislator or if they -- you know, they wouldn't come out that way.

KLOBUCHAR: Well, I just hope you'll take to heart -- one of the comments written about Justice O'Connor when she retired, someone said, on an attentive reading, many of the justices' opinions were infused with a keen sense of what it felt like to live inside the shoes of affected litigants and ordinary citizens and with an almost urgent need to make certain that the outcome of the case, while doctrinally sound, was also workable. And they went on to talk about her approach and -- and a focus on pragmatism.

And when I think about this Melendez-Diaz case and some of the other ones before the court -- in addition to some of the other issues my colleagues have raised -- and this is not an ideological argument. It's just a practical argument of having someone that will go in there and think about the effect that some of these decisions have on ordinary citizens. So I hope you'll take that to heart.

Last thing I wanted to ask, as the daughter of a former reporter, it's just about -- there's been a lot of talk about the First Amendment as it relates to political speech, but I just want to talk for a minutes on *New York Times v. Sullivan*.

And in 1993, you wrote a book review and you discussed the Supreme Court's decision in that case, which as you know was a critically important decision for libel law and for the First Amendment specifically.

And your 1993 piece recognized how important the *Sullivan* decision was for First Amendment jurisprudence, but discussed the fact that the actual malice standard had been applied in libel cases that differed a great deal from those facts in *Sullivan* back in the 1960s with the civil rights movement.

You wrote in that review that, quote, "The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy."

And you wondered, is uninhibited defamatory comment an unambiguous social good? That is, does it truly enhance public discourse, you asked. And I wondered if you agreed with your past comments on Sullivan and -- and whether or not your last few months going through the -- the media focus with your confirmation hearing has changed your opinion or strengthened it in any way, Solicitor General?

KAGAN: OK. I think people should be able to write anything that they want about me, and I don't think that I should be able to sue them for libel.

KLOBUCHAR: Very good. But how about the case itself and with the changing Internet and -- and -- and other, you know, more social media and bloggers? I mean, does that affect anything? And what -- how about your past comments? Do you have any -- do you want to add to those from the book review?

KAGAN: It's been -- it's been a long time since I read that book review, but I think that the -- the point that the book review was making was, on the one hand, what an iconic decision *New York Times v. Sullivan* is, how important it's been to the development of our First Amendment law, how vital it is to a system of free expression, to have newspapers and other people who speak -- it's not just newspapers, as you suggest.

KAGAN: I mean, given the way the media has developed, there are so many different -- different ways to express thoughts in our world now and to -- to have these speakers insulated from -- from libel suits by people who are in the public sphere, who are -- who are public officials, who are -- who are public figures, and to have an extremely, extremely high bar before those -- those people can recover for any -- any libel that may have been done to.

I guess the question that I was asking in that review, and -- and I -- I continue to think it's a -- a real question, is has -- how far should that go in this sense of -- we should understand that libel can harm people, that reputational harm is real harm, and that people can suffer great damage from their reputations being inaccurately besmirched through utterly false statements.

And I guess the -- the question that I asked was whether there were some contexts where the person had not put themselves into the public sphere in any real way, where the person was, you know, a private actor trying to mind his or her own business and sort of became dragged into the spotlight and -- and something terrible said about that person in a way that had harmed that person.

The law actually does treat that person somewhat differently in libel law, but the question I was asking was whether the balance was -- was -- had been struck appropriately in that sort of case where the -- the values of the First Amendment in uninhibited political speech are -- are not so much evident and -- and where the personal harm can be great.

And it's been so many years since I read that article, I'm not exactly sure how it came out on that question, but -- but I think it's -- it's a real question.

And even as we -- even as we understand the absolute necessity for a kind of *New York Times* versus *Sullivan* sort of rule and for protection of speakers from libel suits, from defamation suits, even as we understand that, you know, we should also appreciate that people who did nothing to ask for trouble, we didn't put themselves into the public sphere, can be greatly harmed by -- by -- as -- as -- when something goes around the Internet, and everybody believes something false about a person.

That's -- that's a real harm, and -- and the legal system should not pretend that it's not.

KLOBUCHAR: OK. Well, thank you very much. And thank you for putting yourself in the public sphere today. And as I said at the beginning, you denigrate the job. Appreciate it.

KAGAN: Thank you.

LEAHY: Thank you very much, Senator Klobuchar.

And Senator Kaufman? Thank you for being here.

KAUFMAN: Thank you, Mr. Chairman.

Good news. When you get to Senator Franken and me, you're at the end of the road.

KAGAN: That's what they tell me, you know, and...

KAUFMAN: I'm talking about the first round.

KAGAN: First round.

KAUFMAN: New round. Some of my colleagues have suggested that you're too political because of your service on the Domestic Policy Council. Can you talk a little bit about the difference between serving on the Domestic Policy Council as opposed to serving on the Supreme Court?

KAGAN: There's a huge difference, Senator Kaufman, in the Domestic Policy Council. I was an aide to President Clinton. I was carrying out -- helping President Clinton to carry out his domestic policy goals and objectives.

As you know, I worked on -- on a variety of issues. I worked on education. I worked on public health, particularly tobacco. I worked on anti-crime measures. I worked on the -- the measures involved in ending the old welfare system. I worked on a number of things. I'm very proud of my service there. I -- I think it contributed to -- to doing some good things for people across this country.

But -- but it's -- but it's entirely a different role. I was, you know, not primarily looking -- there was a period of time in the White House or I was also a lawyer, but when I was a policy aide, I was not primarily looking at things as a lawyer. And even as a White House lawyer, you -- you are a lawyer for a particular administration's perspective and a lawyer for president is trying to achieve a certain set of goals.

As a judge, you are on nobody's team. As a judge you are an independent actor, and your job is -- is simply to evaluate the law and evaluate the facts as -- and apply the one to the other as -- as best, as most prudently, as most wisely as you can.

And, you know, the greatness of our judicial system lies in its independence. And that means when you get on the bench, when you put on the robe, the -- your -- your only master is the rule of law. And -- and, you know, regardless of what political, what administration you might've worked for the past, and -- and there are many justices on the court who -- who have worked for either for Congress or -- or the executive, but -- but just like all of them have, I would, if I'm fortunate enough to be confirmed, you know, put on that rolled add -- and be -- be independent and not favor any political party.

KAUFMAN: I mean, some of them, Sandra Day O'Connor even was an elected official herself.

KAGAN: Sandra Day O'Connor was an elected official herself. That's true. I'll give you another example as a great example. He's actually one of my favorite figures in Supreme Court history, who is Robert Jackson.

And Robert Jackson -- Robert Jackson was such an executive branch man. He had had a series of positions in the executive branch, including in my role, including as solicitor general and attorney general. And he was also, in a way that that very few -- well, a few, but he -- he was very close personally to Franklin Roosevelt even -- even before he had occupied this set of positions. They were real friends.

And -- and Justice Jackson, you know, he got to the court, and -- and the executive branch never counted on his vote, and it's quite the opposite, that he was as independent as they come.

And, you know, the -- the case that everybody knows about, of course, and it's kind of the iconic case, is what he did in Youngstown, where President Truman closes the steel mills and -- and says that this is vital for the national security of the country, and the question comes to the court.

And I think for sure President Truman must have thought, "Oh, well, you know, Robert Jackson will vote with me." And Robert Jackson did nothing of the sort, that Robert Jackson voted against the -- the ability of the executive to take an action like that and wrote one of, I think, probably the strongest opinion ever written on this subject of executive power.

And so, you know, that's the kind of independence that I think a judge has to show. And -- and I think -- and I think -- I think it's sort of a natural consequence of -- of assuming that position.

KAUFMAN: I want to talk a little bit about Leegin. It's been talked about in a number of different places, and I -- and both sides -- everyone on the committee, I think, practically has talked about precedent and stare decisis at least once in the last two or three Supreme Court hearings, so I think it's an important case, because it overturned 96 years of precedent.

Now, the one point that -- Congress, you know, whether Congress has the right to make the facts are Congress has the right to make the rules (inaudible) -- during these 96 years, Congress could have changed this rule, if they came up with a new economic theory, any time they wanted to, correct?

KAGAN: That's true, Senator Kaufman. I -- I will push back a little bit, though, and say that the anti-trust area is a -- is a kind of special area with respect to statutory interpretation that courts have been considered to have more common law power....

KAUFMAN: Right.

KAGAN: ... in this area because of the breadth with which and the generality with which the anti-trust statutes are framed.

KAUFMAN: Right. But this is a new -- a new economic theory is different than a new set of facts or new things we learn about as we go along. I'm just making the point that Congress could have stepped in at any time during those 96 years, if they thought there was a new economic theory that was relevant, and changed the law.

KAGAN: Congress surely could have stepped in at -- at any point, and indeed could do so now.

KAUFMAN: Right. And In Illinois Brick, another Supreme Court anti-trust case, Justice White wrote, and I quote, "In considering whether to overturn precedent, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this court's interpretation of its legislation." Do you agree with Justice White on that?

KAGAN: I -- I think it's a -- a long-standing principle, a very well accepted one, and I -- I do agree with it, that -- that stare decisis is at its highest in the area of statutory interpretation. And the answer is what you just gave, that, look, if the court got it wrong, Congress can change it. And if Congress hasn't changed it, it suggests something, at least, about whether the court got it wrong.

That's a very different kind of situation than when the court makes a constitutional ruling -- where the court makes a constitutional ruling and everybody has to -- has to live with it and abide by it regardless whether it's wrong.

KAGAN: Nobody can change it. So if it's really wrong or really unworkable or -- it's up to the courts.

Not so with respect to statutes.

KAUFMAN: And Justice Roberts was right when he said stare decisis isn't always the only consideration. Just like (inaudible) said in constitutional case and other cases, stare decisis doesn't overrule everything, but it is a major consideration.

KAGAN: Stare decisis is a major consideration, and it's at its height when statutes are concerned.

KAUFMAN: Right.

I'm concerned about Leegin because it seems to me an example -- and this has been talked about by a number of my colleagues on both sides of the aisle -- where you have this results-oriented decision-making. And it just seemed to me five justices decided to overturn precedent simply because they didn't like the outcome (inaudible) the present dictate or the economic theory invited -- embodied -- no matter what the Congress did. I mean, that just seems clear to me.

Without regard to your views on Leegin, please tell us, if confirmed, what factors do you consider when you're asking to overturn a settled issue of statutory construction.

KAGAN: Well, I think that the factors would be the same as in a constitutional case, but then there would be -- you would really, really, really have to find those factors.

So the factors would be the workability of the precedent, if the precedent has just proved unworkable in the sense that courts struggle to apply the test and come up with widely differing results and it produces a kind of erraticism and instability in the law. That would be one.

Another is if the precedent has been eroded over time, and that might be because it's eroded by other doctrinal change. Let's say one precedent is relied on, on three other cases, and then two of those other cases have been reversed themselves, so the precedent is standing on nothing in the way of doctrine. That is an important consideration.

Still a third is if the facts change such that a precedent becomes sort of silly. And the best example I can give you of that is in the search and seizure context. There used to be a rule that said something was only a search if there was an actual trespass on physical property, and then a case came along, it was the Katz case, which involved surveillance issues.

And the court said, "Well, wait a minute. What is -- why should we require a physical trespass on property? We have all these new technological ways of essentially invading people's privacy and searching them without doing a trespass." The sort of technology has overtaken the precedent, and that would be a situation in which the court might reverse a precedent.

So those are generally the circumstances in which that happens -- lack of workability or a kind of erosion because of doctrinal change or because of change in factual circumstances in the world.

But you, as I -- as I indicated before, you really, really have to be sure that one of those things exists, even more than in the constitutional context, when you're dealing on the statutory realm.

KAUFMAN: And how about length of precedent? Would that be a factor?

KAGAN: I think it generally is. I think it generally is just in the sense that it's at least true that the more times that a precedent is affirmed and reaffirmed and reaffirmed and nobody has found anything wrong with it, and to the contrary maybe people have -- have -- have specifically reconsidered the precedent and said, "Yes, we think that this is a good precedent," that that would be a factor.

KAUFMAN: I want to talk another case that's been talked about a lot, and that's Citizens United. And I'm -- I hope I'm going to be dealing with new ground based on what I've heard of the other questioners.

But I think both Leegin, Citizens United, Exxon, these are all cases that (inaudible) everyone's been talking about in terms of where the court's going. And so I'd just ask you, Citizens United case there were two rounds of briefing and second oral argument in that case, right?

KAGAN: That's correct.

KAUFMAN: And who asked for the second round of briefing and oral argument?

KAGAN: Well, the court did.

KAUFMAN: Right. So it was not the parties that asked for the thing.

What question did the court direct the parties to brief and argue?

KAGAN: I don't remember the exact phrasing, Senator Kaufman...

KAUFMAN: No, but just in general.

KAGAN: The question of whether Austin and part of McConnell should be reversed.

KAUFMAN: In your experience is it unusual after briefing and argument for the court to then direct the parties to brief and argue a different question, one drafted by the court itself?

KAGAN: Well, it's unusual. It's not unheard of. It's happened in other cases as well.

KAUFMAN: But it is unusual.

KAGAN: It is unusual.

KAUFMAN: Is it fair to describe the question posed by the court as a broader question of constitutional interpretation compared to questions first presented by the parties?

KAGAN: I think that the question that the court posed had been in the initial complaint, had then been abandoned by the party in the case.

In the briefs that had been filed in the court, that the question and the argument came back in a few paragraphs, so that it was not the focus of the -- of the parties' argument.

KAUFMAN: Without regard to this case and just to go a little more into something you talked about with Senator Whitehouse, your view about a judge choosing between narrow statutory ground for a decision and broad constitutional ground for decision, can you just kind of sum up your feeling about that?

KAGAN: Well, I think that there's a longstanding rule, it's a sensible rule, it's a good rule for the judicial system that to the extent one can, one should avoid constitutional questions. And that means that if one can, one should decide a case on statutory grounds.

Now, that's not always possible.

KAUFMAN: Right.

KAGAN: Sometimes the statute doesn't allow it. You can't make up a statute or recast a statute to make it mean something that it obviously doesn't mean just in order to avoid a constitutional question. But to the extent that you -- it's -- it's -- it's reasonable to construe a statute in a way that avoids a constitutional question, it's, I think, a longstanding practice of judicial restraint to do so.

KAUFMAN: And is it fair to say that the ultimate ruling on Citizens United was not consistent with prior decisions based on corporate election expenditures?

KAGAN: Well, it -- it -- it certainly was not consistent with Austin or with the part of McConnell that was reversed. There was clearly an argument in the case as to what the -- what the other precedents held...

KAUFMAN: Right.

KAGAN: ... whether those precedents were themselves anomalous or whether they were a part of a longstanding tradition. The government had argued the latter.

KAUFMAN: To me it goes back to the same thing as Leegin. I think it's something that I've heard, again, from both sides of the aisle, kind of results-oriented judging, kind of reaching a decision and then trying to figure out how to make it happen, where you take a result and then you figure out how to manipulate it.

I'm not going to ask for your assessment on Citizens United, whether it was results-oriented judging, but talk a little bit about results-oriented judging.

KAGAN: Well, I think results-oriented judging is pretty much the worst kind of judging there is. I mean, the worst thing that you can say about a judge is that he or she is results-oriented. It suggests that a judge is kind of picking sides irrespective of what the law requires, and that that's the absolute antithesis of what a judge should be doing, that the judge should be trying to figure out as best she can what the law does require, and not going in and saying, "You know, I don't really care about the law, you know, this side should win."

So to be a results-oriented judge is the worst kind of judge you can be.

KAUFMAN: So, I mean, we have these issues, like results-oriented judging, precedent, stare decisis, where everybody seems -- everybody on the committee seems to agree. It's kind of remarkable how when we look at individual cases they aren't taken into account. And I'm not going to ask you to comment on that.

Senator Hatch was concerned yesterday, I believe, that small-business owners would not be able to express themselves politically without Citizens United, but under McCain-Feingold there wouldn't be any barrier for a small-business person. Most of these, like S corporations, are just individuals. They could still declare themselves a dividend, take the money and go out and spend it for political -- in political campaigns, correct?

KAGAN: Senator Kaufman, in fact this question did come up at the oral argument in the case, and I was asked a question about it, and I responded in a similar kind of way, that they couldn't do it through the -- they couldn't spend through the corporation itself, but that they could spend individually.

KAUFMAN: I mean, the main thrust of this decision and all the discussion about the decision were corporations and labor unions with massive assets, that they could then invest into a campaign without any government supervision, not part of any kind of legislation, just spend whatever they wanted in that and not -- and that was a clear precedent that was not what we want in this country.

KAGAN: Well, it's certainly the way, when I argued the case, that I understood the congressional record; that when I understood the -- that when I looked at the congressional record and -- and tried to -- to portray to the court what the congressional record was all about, that it -- it was all about larger corporations and trade unions and the way in which they could inject money into the political system and thereby change the outcomes of the political system.

KAUFMAN: Because, really, these -- these -- these institutions have massive amounts of money. I mean, this is not just -- we're not talking about some little corporation (inaudible) these -- these people -- these large institutions could spend hundreds of millions of dollars, if they decide it was in their interest to do so, and that that would completely overtake whatever individual expenditures we have in this country.

KAGAN: Senator Kaufman, the argument that the government made, which was based on Congress's own record, suggested that there was significant potential for corrupting influence in that way.

KAUFMAN: And the other thing that's key, I think, in this is it wasn't just corruption, it was the appearance of corruption. I'm not one that thinks there's that much corruption. But, clearly...

KAGAN: Yes, and the -- and the -- and the appearance of corruption. And that's been something that the courts -- the court's decisions, Buckley v. Valeo, has made clear is a compelling governmental interest preventing either corruption or the appearance of corruption.

Now, you know, the Citizens United court found that the government had not proved its case sufficiently and it had not shown to the high level that's necessary in the political speech context that these dangers would exist. And that is settled precedent going forward.

KAUFMAN: Right. And -- and -- and it -- it really is quite extraordinary, because I have not met anyone in the last 20 years who doesn't think there's at least the appearance of corruption in the way we finance our campaigns. I mean, I cannot -- a single person.

I mean, as soon as people find out that I teach about this or I worked here, they start talking about the appearance. They go more than the appearance, most people. So the idea that the court could rule that there was not the appearance of corruption is really quite extraordinary.

Let me talk a little about Exxon-Baker. In Exxon-Baker, the court limited punitive damages (inaudible) cases to no more than the amount of compensatory damages. That would mean Exxon ended up paying \$2 billion less to victims than it otherwise would have, right? Because of the -- of the ruling, they didn't have to pay \$2 billion in punitive damages.

KAGAN: Got it, yes.

KAUFMAN: And because Judge Alito didn't participate, it's also fair to say that four members of the court voted completely to ban punitive damages and, if Justice Alito had voted the same way, that would have been no more punitive damages. Is that correct?

KAGAN: In this class of maritime suit, yes, I believe that that's right.

KAUFMAN: All right, which it's kind of extraordinary, again, to me. I mean, I think that -- that my experience has been -- and I'm -- I've worked in corporation and the rest of it -- that when you're trying to make a decision about safety or any other thing, kind of what the cost could be has to be a factor in your decision.

And so I just wonder, with the -- the lack of punitive damages, if it had ruled in Exxon-Baker, what kind of impact that would have in the gulf or what kind of decision has with -- with British Petroleum or any other company trying to decide whether they're going to put in the necessary safety requirements to avoid a potential spill with liabilities, not just cost liabilities, but also punitive liabilities.

Let me talk about regulatory reform authority. As I said in my opening statement, I'm concerned that in business cases the current Supreme Court too often seems to disregard settled law and congressional policy choices, and we talked about that.

And Congress is about to enact, we hope, an improved financial regulatory system. I want to make sure that the system is not undermined by judges who may have a different view of the proper role of government legislation.

Without asking you about that legislation, do you believe as a general matter Congress has a constitutional authority to regulate financial markets?

KAGAN: Congress has broad authority under the commerce clause, and -- and -- and certainly most regulation of financial markets that I could think of would substantially affect interstate commerce.

Doesn't mean to say that there couldn't be something unconstitutional in this area as in any other, but the -- the standard test is whether activity substantially affects interstate commerce. There's limits on non-economic activity, but presumably the regulation of financial markets would -- would -- would not be that.

KAUFMAN: And can you talk a little bit about what -- what the judge's idea of the wisdom of a statute should play in -- in the judge's decision?

KAGAN: I don't think it should at all. And I -- I -- I think I -- I guess I talked yesterday about Oliver Wendell Holmes, who was the justice who in the earlier 20th century was most adamant that the court was going down the wrong road in striking down a whole series of pieces of economic legislation.

And what most people, I think, don't know about Justice Holmes is that he thought all this economic legislation was -- was dumb. I mean, he was not in favor of these various pieces of progressive legislation for the most part.

And, you know, notwithstanding that, he said, look, I might think that this legislation is unwise, but this is a -- this is a choice for the American people. And, you know, if -- if -- if I'm right and it turns out that they've done unwise things, they'll correct it.

And I think that that's what the attitude of judicial restraint to the -- judicial deference to the democratic process really is. It doesn't matter whether you like the legislation or not.

Not to say that courts don't have an important role. Courts do have an important role in policing those constitutional boundaries. But -- but -- but in fulfilling that role, you know, courts should realize that they're not the principal players in the game.

KAUFMAN: Let's talk a little bit about dean at Harvard. What did -- when you were dean at Harvard, what did you do to promote public service?

KAGAN: Well, I -- I -- I tried to do a lot, because I -- I -- I think it's one of those things that -- you know, public -- it's one of those things that on the one hand, what -- what -- what our students find is they do good for other people and that they also create meaningful professional lives for themselves.

So I -- working with, you know, quite a large number of people at Harvard, I think some of whom are here in -- in -- in the rows behind me, we tried to very much increase clinical opportunities to give people a sense of what it actually meant to do public service. I tried to use the -- you know, the bully pulpit whenever I could to talk about the importance of these issues.

And -- and I -- I think we had good results, that the -- that the number of students who did clinical work in the law school went up very dramatically, that the number of students -- I was speaking with Senator Cardin yesterday about our pro bono requirement, which says you have to do 40 hours of work in public service kind of activities, helping people who can't afford legal services to get necessary legal services, you have to do 40 hours a week -- excuse me, 40 hours by the time you graduate, 40 hours by the time you graduate.

And students were doing an average of 500-some hours, so 10 times what they had to do. And I think that that was because they -- they found it meaningful for themselves to see how their legal profession -- how their legal training could be used to help real people solve real problems. And -- and -- and I think it was -- it was great for the surrounding community.

Harvard Law School is now the second-largest provider of legal services in the state of Massachusetts. And I think that that's something that the -- that the school can legitimately be proud of.

KAUFMAN: Let me ask you, you know, large modern corporations are great and they're what make America great and they provide jobs, but they also have vast resources at their disposal. What's the role in the Supreme Court in making sure that there's a level playing field between major corporations and the individual American?

KAGAN: Well, Senator Kaufman, I think that the role of the court is to provide a level playing field for all Americans. And -- and this is what I tried to convey in my opening statement, that the greatness of the court and the greatness of the court historically has been that, no matter who you are, your arguments are considered with the same kind of respect, your arguments are given the same kind of attention.

And if -- if -- if you're right on the law -- and you have to be right on the law -- but if you're right on the law, it doesn't matter that -- that your opponent has a great deal more wealth or more power than you do.

And -- and one of the things that I found remarkable in my time as solicitor general, as I walk into that court and I represent the government -- and -- and people might think that the government is kind of favored in the court, but anything but.

You know, the government is given just as hard a time as every other litigant. In fact, I think some justices actually think it's -- it's -- it's OK to give the government a harder time. And I think that that's fine, because the government does have, you know, a lot of resources and a lot of ability up there.

And -- and so every single person who comes before the court has to be treated equally, and every single claim has to be considered fairly. And whether you're a rich person or a poor person, whatever your race, whatever your religion, whatever your belief, you're entitled to the same kind of respect, and that I think that the greatness of our court system historically has been that you've generally gotten it.

KAUFMAN: You spoke yesterday with reverence about Justice Marshall's reverence to the American judicial system. You've also written about it. I'd like to read you one of your quotes.

"In Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts. It demanded that the court show a special solicitude for the despised and disadvantaged. It was the role of the courts in interpreting the Constitution to protect the people who went unprotected by every other organ of government, to safeguard the interests of people who had no other champion. The court existed primarily to fill this mission."

Some of my colleagues have used this statement to attack Justice Marshall. Could you elaborate on what you said in that tribute and what it means to you as a nominee to the Supreme Court?

KAGAN: Well, what I was trying to say, Senator Kaufman, is really what I just said to you, that Justice Marshall lived in a time and he lived in a world and he lawyered in a world in which many doors were closed to him. As he was trying to eradicate Jim Crow segregation, he was not met with much -- you know, you could walk into the statehouses and you could walk into Congress and you can walk into the White House, and there were not a whole lot of people who were willing to listen to the kinds of claims he was making, just claims, for racial equality.

And I think what he -- the reason he revered the courts was that step by step by step over the years he did find success in the courts because the courts were willing to listen to those claims in a way that nobody else in the governmental system was. And he made great progress and did great justice going to the courts and arguing his cases there, and expecting no more -- expecting no more than that the courts would rule on him if he was right on the law and on the meaning of the Constitution, but step by step by step succeeding in that mission.

KAUFMAN: Thank you very much.

Thank you, Mr. Chairman.

LEAHY: Thank you very much, Senator Kaufman.

We're going to do just -- we were just discussing the schedule up here. We'll have Senator Franken's questions, and then we're going to take a very short break. There is a vote I'm told at noon on General Petraeus. We have a couple people who will vote at the desk when it starts because we will not -- we will not stop the hearing for the votes. We'll just -- people will go back and forth and vote and keep the hearing going, and then we'll take a lunch break at an appropriate time.

Senator Franken, you're on, and then we'll take a break.

FRANKEN:: Thank you, Mr. Chairman.

General Kagan, I really liked something you said yesterday in your conversation with Senator Kyl. You said that "one of the glorious things about courts is they provide a level playing field in all circumstances, and that we need to make sure that every single person gets the opportunity to come before the court and gets the opportunity to make his best case and gets a fair shake."

I want to discuss something that is denying more and more working Americans that precious day in court -- that fair shake, and that's mandatory arbitration. Now, arbitration has its place. I'm talking about mandatory arbitration.

Chances are if you have a cell phone or a credit card or if you work, you're likely to have signed a contract with a mandatory arbitration clause. These clauses basically say if we violate your rights, you can't take us to court. You have to take it to an arbitrator. But then the fine print essentially says an arbitrator that we pay who depends on us for work and who makes decisions in secret.

So a lot of people are denying their opportunity to come before the court. Unfortunately, we've seen a series of decisions from the Supreme Court that have made it even harder for people to get that fair shake, as you put it.

In 2001, in a case called *Circuit City*, the court was asked to decide whether workers' employment -- employment contracts could be subject to mandatory arbitration. This really should have been a no-brainer because the Federal Arbitration Act of 1925, the law that says which arbitration agreements should be enforced, specifically exempts, quote, "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

Organized labor had asked for this specific language to be included to make sure the act would not apply to workers' employment contracts. In fact, then-Commerce Secretary Herbert Hoover said during a Senate hearing, quote, "If the objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating that nothing herein contained shall apply to the contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate commerce."

Secretary Hoover was saying that if Congress wanted to make clear that the Federal Arbitration Act did not apply to employment contracts, Congress should put this language in the statute. So Congress put the language in the statute. But when Justice Kennedy wrote the majority opinion in *Circuit City*, he ignored the history. He wrote, and I quote, "We need not assess the legislative history

of the exclusion provision." Let me repeat that: "We need not assess the legislative history of the exclusion provision."

And based on a strained reading of the law, he decided that the exception only applied to workers in the transportation business, not any class of workers. This means that instead of all workers getting their day in court in Congress, like Congress clearly intended, only transportation workers would get it, and that excludes the vast majority of American workers.

General Kagan, I really disagree with this case and the way the court ignored Congress' intent. That's why I was glad to hear your response to one of Senator Schumer's questions about how the court should interpret statutes. You said that among other things, quote, "I think a judge should look to the history of the statute in order to determine Congress' will."

General Kagan, we spend a he lot of time in hearings and on the floor debating legislation. How much weight do you think a judge should give to the deliberations of Congress and the reasons why we passed a law in the first place?

KAGAN: Well, Senator Franken, the most important thing in interpreting any statute -- in fact, the only thing that matters in interpreting any statute -- is Congress' intent. Congress gets to make the laws under Article One of the Constitution. And what the court should be doing in applying those laws is trying to figure out what Congress meant and how Congress wanted the laws to be applied. That is the only thing that the court should be doing.

Now, sometimes that can be a difficult task. New situations come up. The statutory language -- it's not clear how the statutory language applies to those new situations, or sometimes Congress might simply not have thought of particular situations. Language is by necessity inexact. And so there are going to be cases which...

FRANKEN: Do you agree with Justice Kennedy, we need not assess the legislative history of something?

KAGAN: Well, I would -- I would say this. I would say where the text is clear, the court should go with the text. Where the text clearly covers some situation, the court should do that. The court should not rewrite the law.

FRANKEN: But shouldn't the court assess that -- make an assessment there?

KAGAN: Well, I think if the text is clear, Congress should not -- the court should not rewrite the law. But where the text is ambiguous, which often happens...

FRANKEN: And wouldn't you have to assess whether it's ambiguous?

KAGAN: Yes. I mean, the first step is...

FRANKEN: So what Justice Kennedy said doesn't stand up to that, does it?

Let me -- let me move on on that. We in Congress, we want to make sure, all of us, that our intentions are clear so that 75 years from now the Supreme Court doesn't just ignore the purpose behind the laws we are passing. How can we do that? How do we do that? How do we do that? How do we make it clear to future justices?

KAGAN: Well, the courts surely would be helped if Congress spoke as precisely and exactly and as comprehensively as it could in all situations.

KAGAN: You know, there -- there are some instances where the -- the court just has legitimate difficulty trying to figure out what Congress intended and where judges, all of whom agree that what they should be doing is doing what Congress intended, have difficulty determining that or disagree about what that means.

And -- and certainly to the extent that Congress can make its intentions clear in legislation and can specifically spell out how it intends for the law to operate, Congress ought to do so. And, of course, you know, to the extent that the court gets something wrong with respect to a statute, and this has happened, you know, many times in -- in recent years and in prior years, as well -- to the -- to the extent that the court gets something wrong, of course Congress can come back and change it, and make clear that the court got it wrong, and -- and also use it as an opportunity even to make clear its intentions with respect to a general area of law.

FRANKEN: OK. It's hard to do 78 years from now, but we'll try.

Circuit City was a Rehnquist court decision. Just last week, the Roberts court did Circuit City one better in helping employers keep their workers out of court and into arbitration. It happened in a case called *Rent-A-Center v. Jackson*, which Senator Feingold noted yesterday.

Rent-A-Center had 21,000 workers and hundreds of millions of dollars in annual profits. It also forces its workers to sign a mandatory arbitration agreement as a condition of employment.

Antonio Jackson, an African-American account manager in Nevada, had been working for Rent-A-Center for years, but he was frustrated because he watched his company pass him over for promotions again and again. Instead, they promoted workers who had less experience and who weren't black.

Although Jackson signed an employment contract agreeing to arbitrate all employment claims, this seemed blatantly unfair, and he sued Rent-A-Center. But the company argued that only the arbitrator could decide whether the arbitration clause was unfair. Let me repeat that: Rent-A-Center argued that only the arbitrator could decide whether the arbitration clause was unfair.

Last week, the Roberts court sided with Rent-A-Center. Talk about not getting your day in court. Now you can't get your day in court to get your day in court.

Now, General Kagan, I know I probably can't ask you about whether you think this case -- well, I can ask you, but you won't answer -- whether this case was correctly decided, but I would like to ask, do you still agree with what you said yesterday to Senator Kyl, that one of the glorious things about courts is that they provide a level playing field in all circumstances and that we need to make sure that every single person gets the opportunity to come before the court and gets the opportunity to make his best case and gets a fair shake?

KAGAN: Well, I -- I -- I do agree with that very strongly, Senator Franken. And if I might, if I might just return to this question of statutory interpretation that you started off with, because I did want to make clear that, when a text is ambiguous, which, you know, frequently happens, which frequently happens, then I think that the job of the courts is to use whatever evidence is at hand to understand Congress's intent, and that includes exploration of Congress's purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted, and in what circumstances, and by way of looking at legislative history.

Now, I think courts have to be careful about looking at legislative history and make sure that what they're looking to is -- is reliable, but courts should not at all exclude signs of congressional intent and should -- should -- should really search hard for congressional intent when the text of the statute itself is unclear.

FRANKEN: Good. Then I think you and I agree that Justice Kennedy may have been in error when he said that -- that the court doesn't have to assess the legislative history.

KAGAN: Well, I suspect that -- I -- I don't know the case very well. I suspect that Justice Kennedy may have meant that he thought that the text was clear and, therefore, the legislative history was not something that should appropriately be explored, but I'm just guessing on that.

FRANKEN: OK. I think you're guessing wrong.

KAGAN: OK.

(LAUGHTER)

FRANKEN: General Kagan, you've -- you've gotten a lot of questions about...

KAGAN: It's not the first time in my life.

FRANKEN: And nor the last. We all guess wrong.

You've gotten a lot of questions about Citizens United. I'm going to try to bore down a little deeper on this.

First of all, I want to make it totally clear that a full 80 percent of Americans who hear about this case just think it's a bad idea. The first problem is the impact it's going to have on our communities and our ability to run those communities, because the potential for corporate influence on our elections under Citizens United is going to dwarf what it is today and may very well totally drown out individual citizens.

Before Citizens United, if a corporation wanted to run an ad that said, "Vote for Joe," it could only use money from its political action committee, or PAC. Those PACs relied on donations from employees and executives, individuals, and those corporations. In the 2008 cycle, all federal PACs combined spent a total of \$1.2 billion.

Now, after Citizens United, if a corporation wants to run an ad that says, "Vote for Joe," it can use all of its money, its treasury funds, its revenues, all of its money. In the 2008 cycle, the combined gross revenue for Fortune 100 companies was \$13.1 trillion.

Now, obviously, they're not going to spend all that money on ads or all of it on just any election. They would spend a lot -- but they can spend billions when they could have spent under this law, billions, when we tried -- when we passed the law that took the lead out of gasoline, when we passed the law that required seat belts.

And they're going to spend it when we try to protect against oil drilling in deep water when we don't have safety precautions or Wall Street fraud. They're going to spend their money against the consumer and environmental laws that protect our families and our homes.

General Kagan, this is one of the last things that Justice Stevens said in his dissent. "At bottom, the court's opinion is a rejection of the common sense of the American people who have recognized the need to prevent corporations from undermining self-government since the founding."

What do you think that means, General Kagan?

KAGAN: Well, Senator Franken, when I argued the case, I thought that the strongest argument of the government was the very substantial record that Congress put together, which I think reflected the sense of the American people, that these monies from these actors spent in this form could have substantial corrupting effect on the political process, and that's the argument that the government made to the court.

Now, as I've indicated before, I approached this case as an advocate, not as a judge, and that there are certainly strong arguments on the other side, as well. And in particular, there's the fact that political speech is the highest form of speech under the First Amendment entitled to the greatest protection and that the courts should be wary of Congress regulating in this area in such a way as to protect incumbents to help themselves. And I think that those are strong arguments.

The argument that the government made in defense of the statute as against that was really an argument about the strength of the governmental interest involved in this case in preventing corruption from this kind of expenditure of money.

FRANKEN: General Kagan, another problem with Citizens United was how it was decided, because it was decided in a manner that was really unfair to the American people. Let me explain.

FRANKEN: When you go to trial, you make arguments and you introduce evidence to back up those arguments. Now, you can't introduce evidence after trial. So if you appeal, you can't just come up with a new argument, because the appeals court doesn't have any evidence to decide it on.

This is why there is an old rule that the Supreme Court shouldn't answer questions they aren't asked, whereas Justice Scalia said to you in your first oral argument on this, "We are not a self-starting institution. We only disapprove of something when somebody asks us to." If the court expands the scope of the question before it -- this is me, you know -- it won't have the evidence it needs to decide that question.

But that's the opposite of what the court did in Citizens United. In Citizens United the plaintiff argued and presented evidence of this question. Should a certain part of McCain-Feingold apply to certain kinds of nonprofits? And that's not the question that the Roberts Court answered.

This is how the Roberts court answered. No, McCain-Feingold shouldn't apply to nonprofits or for-profits or unions, and neither should a different law that Congress passed 40 years ago. In fact, both of those laws are unconstitutional for everyone.

Because the Roberts court answered a question that wasn't asked, it never got evidence on how McCain-Feingold was actually affecting most nonprofits or any for-profit corporation or union. This is what you said in the case, in your argument.

What the government -- or this is what you said, actually, here in the hearing -- what the government tried to argue in Citizens United was that Congress had compiled a very extensive record about the effects of these expenditures by corporations and unions on the political process. And what that Congress had found was that these corporations and unions had that kind of access to congressmen and a kind of influence over congressmen that changed outcomes, and that was a corrupting influence on Congress.

That was a many, many thousand-page record. So this finding of fact was ignored because it -- it had to be. As Justice Stevens said, the record is not simply incomplete or unsatisfactory, it is nonexistent.

General Kagan, you were criticized at the beginning of this for being outcomes or results-oriented, especially in your bench memos to Justice Marshall. How's this for guaranteeing an outcome?

You wait until the case is out of the trial court. You wait until it is too late to submit evidence. You wait until the institutions that broke the law can no longer submit evidence. You wait until the appeal has been argued at the circuit court. You wait until the oral argument before the -- the -- you wait until the argument -- oral argument -- before the Supreme Court, and then you change the issue under consideration to get the outcome you want.

If that isn't outcome-oriented, I don't know what is. I'd love to ask if you agree, but, you know, I don't want to force you to criticize your future colleagues.

So instead, let me see if you agree with some general statements of law. In general, do you agree with Justice Scalia that the Supreme Court is not a self-starting institution that should only disapprove of something when somebody asks it to?

KAGAN: That's certainly true. It's a basic postulate of the way we run our judicial system that the court doesn't issue advisory opinions, that the court doesn't issue opinions on -- on anything except what's necessary to decide a concrete case of controversy before it.

FRANKEN: OK. How about this? Here's something that Chief Justice Roberts said when he was a circuit court judge. He said, "If it is not necessary to decide more, it is necessary not to decide." Do you agree with that?

KAGAN: I do agree with that, Senator Franken. That, too, is a basic principle of our legal system.

FRANKEN: So...

KAGAN: And it's a -- it's a requirement of -- or it's a -- it's a foundation stone of judicial restraint.

FRANKEN: Well, I'm glad you agree with that. Do you agree with Justice -- Chief Justice Roberts that courts should decide matters as narrowly as possible?

KAGAN: Yes, I do, Senator Franken, in -- in part for the reasons I was discussing with Senator Whitehouse, that this leads to a kind of restrained decision-making in which consensus can be most easily achieved and -- and appropriate and restrained outcomes most easily reached.

FRANKEN: OK. I would be the last person to draw conclusions from your answers, but...

(LAUGHTER)

... to be honest, in *Citizens United*, I don't think Justice Stevens or -- I'm sorry, Justice Scalia or Chief Justice Roberts adhered to their own principles. I think they were legislating from the bench.

I want to talk about -- a lot of people talked about *Exxon*, but I -- I -- there were a couple of other Supreme Court decisions that dramatically weakened our ability to protect the environment. Senator Feinstein asked you about one of those cases yesterday, the *Rapanos* case, and you said that you weren't familiar with it, so let me just summarize it very quickly.

In *Rapanos* the Supreme Court looked at what kinds of wetlands are protected in the Clean Water Act. After Congress passed the act in 1972, the EPA and the Army Corps of Engineers passed regulations to enforce it. Basically, the act said that it covered navigable waters, but the Army Corps realized that to protect those navigable waters, it also had to protect the wetlands and streams that fed into or would use those navigable waters, you know, because it's water. And so they did.

The court extended coverage to those waters, too, but in *Rapanos* the court struck down these regulations, because it said they were too broad, even though they had been in place for up to 30 years or actually necessary to protect America's water. And this water is what people drink, people catch fish in, and that our kids swim in.

Thanks to this case and a similar case known as *Swank*, the Clean Water Act now it doesn't cover half of the nation's largest polluters. And thanks to these cases, a lot of western Minnesota is outside the protection of the Clean Water Act, and so is a large part of the Gulf Coast.

Yesterday you discussed the *Chevron* doctrine with Senator Feinstein. As you explained, *Chevron* says that the courts should generally defer to agencies and their regulations because, quote, "Congress would have wanted that the entity with political accountability and expertise make the decision rather than the courts."

Let me ask you a few questions. General Kagan, can you tell me how many of the Supreme Court justices have a degree in the environmental sciences?

KAGAN: Gosh, I don't know, Senator Franken.

FRANKEN: I don't either. I think it's none, though.

KAGAN: OK.

(LAUGHTER)

FRANKEN: Can you tell me (inaudible)? We're going to both guess together.

(LAUGHTER)

KAGAN: I'll guess none.

FRANKEN: That's what I would guess, too.

Now, of course, the court has to make decisions in areas who don't have expertise, personal knowledge. But when they rewrote the Army Corps of Engineers regulations on wetlands, the Roberts court didn't have any special subject matter expertise on that issue.

General Kagan, what -- what does Chevron protect, if it doesn't protect regulations issued 30 years ago that were never questioned by Congress and were and were enforced repeatedly during that period?

KAGAN: Well, Senator Franken, Chevron says that where there is ambiguity in the congressional statute -- where -- where there's not ambiguity, you just go with what the statute says. But where there's ambiguity, that an agency's interpretation of what Congress intended for a statute to mean should receive deference from the courts.

And the idea really is that the agency is better able to clarify that ambiguity, because it's -- it has a kind of expertise in the area and also because it has real political accountability through the president. And the courts have neither expertise in one of these various technical subjects, nor do the courts have electoral legitimacy. The courts are by design cut off from the people.

So for both competence reasons and legitimacy reasons, Chevron says, as between courts and agencies in -- in interpreting unclear statutes, you should give the nudge to agencies, that courts should defer to their decisions.

It's -- it's actually a Justice Stevens opinion. It's -- I think it's one of the most cited cases, maybe the most cited case in Supreme Court history.

FRANKEN: And yet, in this case, the court didn't give deference to that, did it?

KAGAN: Senator Franken, as I indicated to Senator Feinstein, I haven't read this opinion ever. I think that, you know, this might be one where the...

FRANKEN: Well, if you trust me in my -- my description of it, which is -- oh, never mind. Why would you do that?

(LAUGHTER)

OK. Let's say my description was accurate. Does it strike you that maybe they didn't give proper deference -- I mean, I know that's hypothetical...

KAGAN: Well, Senator Franken, this is...

FRANKEN: ... that my description would be accurate.

KAGAN: You know, I've -- I've been an administrative law professor, and -- and Chevron is actually something that I've written a good deal about, and I think I've -- I've written about it in a -- beyond the fact that Chevron is obviously settled law going forward, I have to say, if you look at my -- my writings on administrative law, you know that I'm a sympathizer with Chevron for the kinds of reasons that I just suggested.

FRANKEN: That's -- thank you. Thank you. Thank you for your indulgence. And I have a minute-fifteen left. And you know what? I'm going to yield that time.

(LAUGHTER)

LEAHY: And I hope...

KAGAN: That's really good of you.

LEAHY: We've -- we've talked a great deal about precedent here, Senator Franken. I hope that's a precedent others will follow.

(LAUGHTER)

You know, I'm -- these people, it's always hopeful. Sometimes my hopes are dashed. But we will take -- in any event, we will take a very brief break, and then we will come back.

(RECESS)

LEAHY: We have the nominee back, and we will -- now senators will have up to 20 minutes to ask questions, second round.

I emphasize the "up to," and I hope any senator feels that they don't -- especially most questions have been asked; I realize not everybody's asked them -- they don't feel that it's necessary to go and repeat some things, they might not use all their time. But we're doing this so we can finish with the nominee today.

We have outside witnesses, both Republicans and Democrats have outside witnesses and we have to figure out when we can use them -- all of this because of the change in the schedule with the Byrd memorial, where we've been asked not to hold hearings from 10:00 to 4:00 tomorrow when he's lying in repose in the Senate chamber. And of course on Saturday -- or Friday and Saturday, there are memorial services.

So I will reserve my time and I yield to Senator Sessions.

SESSIONS: Thank you, Mr. Chairman.

Solicitor General Kagan, I enjoyed our conversation yesterday, but was disappointed a bit with regard to how you described the situation at Harvard and the blocking of the military to have full and equal access to the recruiting offices as required by law. I think that the White House has been spinning that story inaccurately, and I believe your testimony was too consistent with an inaccurate spin and didn't frankly set forth what you did. I don't -- and I was a bit disappointed at that.

I'd like to follow up and go in a little different direction today. Ironically and almost amazingly, it fell to your lot as solicitor general to defend that very law, the law of the United States, the "don't ask/ don't tell" law that you opposed so much there.

And let me focus on your responsibility and how you handled it. During your confirmation process, you stated that your, quote, "role as solicitor general, however, would be to advance not my own views, but the interests of the United States," and that you were, quote, "fully convinced that you could represent all of these interests with vigor even when they conflict with my own opinions," close quote.

I think that was the right position, the only position you could take if you were to assume that office. And because of your widely publicized opposition to the "don't ask/don't tell" law and to the Solomon amendment, you were specifically asked at the hearing if you would be able to defend those statutes as solicitor general, and you said that you would. You said, quote, that your approach, quote, "to cases involving challenges to the statute involving 'don't ask/don't tell' policy would be the same," and that you would, quote, "apply the usual strong presumption of constitutionality," as reinforced by the, quote, "doctrine of judicial deference to legislation involving military matters."

Now, during your time as solicitor general, two cases came before you challenging "don't ask/don't tell." They came up from the federal Courts of Appeal. One case was from the First Circuit in Boston, your old circuit, filed by 12 plaintiffs, individual different plaintiffs. The ACLU and your former colleague, Lawrence Tribe, represented that group.

A second case, Witt v. Department of Air Force, came out of the Ninth Circuit. It was filed by a single plaintiff and the ACLU was the attorney in that case, or one of the attorneys in that case.

So in both cases, a plaintiff argued that the Supreme Court's recent decision in Lawrence v. Texas meant that the "don't ask/don't tell" law, which says that people who are openly homosexual may not serve in the armed forces, should be struck down as unconstitutional.

In the First Circuit case, the court upheld "don't ask/don't tell." The plaintiffs said the law was unconstitutional as applied to them. The court agreed that Lawrence v. Texas called for elevated scrutiny, but upheld the statute at that time.

Later -- but the Ninth Circuit did not approach it in that way. They did not apply the traditional deference to military issues, as did the First. The Ninth Circuit invented a new standard of review for the substantive due process challenge, requiring the government to make detailed individual findings in these cases.

Most importantly, unlike the First Circuit, the Ninth Circuit failed to acknowledge the need for uniformity in military policies. And so the court held that the plaintiff was entitled to a full trial, and that every plaintiff, apparently, would be entitled to a full trial, something that the military had been resisting steadfastly for a number of years.

And so in the First Circuit case, interestingly, 11 of the 12 plaintiffs didn't ask for review, even though they had lost the case. I can only assume this is because they were concerned they may lose the case if the Supreme Court took it and had a clear view of the law. They had, as you know, they upheld the Solomon amendment eight to nothing, and I think based on the history, we could expect the Supreme Court to affirm that statute, in my personal judgment.

But the -- and so you -- you told the Supreme Court they should not take the case up. One plaintiff did ask that it go up. And you contended that the Ninth Circuit was a better vehicle, and the Ninth Circuit case had shortly before that moment had already been remanded to the trial court to conduct a significant trial that was contrary to the position that the Department of Defense had been taking. And indeed, it would be difficult, if not impossible, to enforce the "don't ask/don't tell" law if you have to have an individual trial in all of these cases.

SESSIONS: So it was a severe damaging blow to the Department of Defense and the Ninth Circuit law would control 40 percent of America. It's the biggest Circuit of all.

And so the result was neither case was appealed on the -- on the law, and the position of -- which was contrary to the consistent position of the military, and it undermined their ability to have, I think, an effective enforcement and even a fair enforcement on the policy.

So I guess I would ask you why you made that decision. And it means -- it's important to me, based on your representation to the court, that I'll understand that you were fully committed to vigorously defending that law, because I think that was your responsibility. It was an oath you took.

And I'm having a difficult time of understanding why, even though it would have been an interlocutory appeal -- I know it would have been -- but it was an interlocutory appeal of the Third Circuit case that the Supreme Court took and promptly reversed their decision.

And so I guess I'd just like to hear you state in as much -- with as much specificity as you -- as you can why you felt it necessary not to appeal either one of these cases.

KAGAN: True, Senator Sessions, I think that we have acted -- I have acted in the solicitor general's office consistently with the responsibility which I agree with you very much that I have, to vigorously defend all statutes, including the statute that embodies the "don't ask/don't tell" policy.

So take the Pietrangelo case first, which was the First Circuit case, where the First Circuit upheld the "don't ask/don't tell" policy, and Mr. Pietrangelo brought a challenge to that decision, and the question was -- you know, he was challenging a decision that the -- the government very much approved of, which was a decision that upheld the "don't ask/don't tell" policy.

And we told the court, in no uncertain terms, not to take the case, and we defended the statute vigorously. We told the court not to take the case because the statute was constitutional.

So in that Pietrangelo brief that I filed -- and it's a brief on which I'm counsel of record -- the -- the -- the argument is made vigorously that the "don't ask/don't tell" statute is fully constitutional, given the appropriate standard of review, and particularly given the deference that courts properly owe to the military.

So the Pietrangelo brief is a brief -- and, again, I'm counsel of record on that brief -- in which the U.S. government vigorously defended the "don't ask/don't tell" policy and statute, more importantly, and told the court not to take a case which challenged a decision upholding that statute.

Now, as to the second matter, the Witt matter, as -- as -- as you said, the Witt matter is interlocutory in nature. And -- and what that means, for people who aren't familiar with these legal terms, is that it means that the case is in the middle and that the government can, after remand, at a later stage, continue to defend the "don't ask/don't tell" statute in this very case.

Now, we engaged in very serious discussions with the Department of Defense about the appropriate approach here in order to defend the "don't ask/don't tell" statute, because I agree with you, Senator Sessions, that the Ninth Circuit decision undercuts that statute. It makes it harder for the government to carry out its policies under that statute.

And -- and the question that we had to decide was whether to challenge that Ninth Circuit decision, which I think does -- is in real tension with the "don't ask/don't tell" statute, whether -- the question we had to decide was whether to challenge that Ninth Circuit decision at an early stage or at a late stage of the case. It was a matter of timing.

And we talked a good deal about this, of course, amongst ourselves, but also with the Department of Defense, and we decided that the better course was actually to -- to wait on it and to accept the court's remand.

The case is not at all closed. Instead, the case is on remand in the -- in the district court -- to take that remand, and in the event that we didn't win the case on remand or in the Ninth Circuit again, in that event, then have the option to -- and presumably would -- take the case to the Supreme Court to challenge the Ninth Circuit's holding.

And when we did this, we wrote a letter to the Judiciary Committee. It's called a 530d (ph) letter, which is a letter which the Justice Department writes whenever there's a moment at which it does not -- does -- does -- does not contest a decision that is inconsistent with a federal statute.

We wrote a 530d (ph) letter to the Senate Judiciary Committee, and we basically laid out this explanation. We basically said, we still have the opportunity to approach the court and ask the court to take certiorari in this case. And we presume that we will use this opportunity, if we don't get the case dismissed in the district court, but that we think it's actually better to go to the district court to take the remand and then to come back to the Supreme Court, if it's necessary to do so.

And the reason that that approach was chosen was because we thought that it was -- it would be better to go to the Supreme Court with a fuller record and with a fuller record about the particular party involved, maybe more importantly with a record that would show exactly what the Ninth Circuit was demanding that the government do.

Because what the Ninth Circuit was demanding that the government do was, in the government's view, and in -- particularly in DOD's view, a -- a kind of strange thing, where the government would have to show, in each particular case, that a particular separation caused the military harm, rather than that -- rather than to view it in general across the statute.

And one reason we thought that the remand would actually strengthen the case in the Supreme Court was because the remand would enable us to show what this inquiry would look like, what the Ninth Circuit's -- the inquiry that the Ninth Circuit demanded would look like, and to suggest to the Supreme Court, using the best evidence there was, how it was that this inquiry really would disrupt military operations.

So that was our decision-making process. It was, as I say, a decision-making process that we wrote about to Congress when it occurred and stated specifically that this was a timing issue for us, that we were not going to the Supreme Court at the earliest possible moment, but, instead, waiting.

And I should just put one other factor into the mix, which I left out along the way, which is that there is a Supreme Court presumption that cases should not be taken in an interlocutory posture, that instead the Supreme Court ought to -- that the Supreme Court ought to wait and the parties ought to wait before asking the Supreme Court to take a case until the case is sort of well and truly over, when it's not in the middle of things.

Now, I don't want to overstate that. That's a presumption. It's not a flat rule. It's a presumption against interlocutory review. But it was something that we -- that we weighed in the balance.

Here we had a presumption against interlocutory review, and we had some good reasons for thinking that our case would be made stronger if we did not take the case in an interlocutory posture, but, instead, waited for the remand to be completed before we went to the court and asked (inaudible) to review the Ninth Circuit decision.

SESSIONS: Well, I appreciate that position. I -- I -- I will look at it and review it.

SESSIONS: It does appear, however, that your position was in harmony with the position that the ACLU took, who was on the other side of the case. And I see no harm in taking an -- attempting an interlocutory appeal, and I do note that they took it in the 3rd Circuit Solomon amendment case and promptly reversed and -- you know, rendered a decision consistent with the government's position.

I think the last refuge of a big government scandal -- scoundrel -- is the commerce clause, it seems. Everything -- when you have no other hat to hang your -- peg to hang your hat on, you claim it impacts commerce.

You cited yesterday the Lopez and Morrison case a number of times, which seems to defend legitimate -- say that legitimate regulations defended under the commerce clause must, wonder of wonders, deal with economic commercial-type matters.

I guess, first, have you ever commented or -- and you cited that, to Senator Coburn, I think, and to others, that this could have an impact on his question which dealt with, could you tell an individual American how many vegetables they should have for lunch every day or something to that effect.

What's your view -- have you expressed any opinions previously on Lopez and Morrison? They were very controversial at the time. And do you agree with those 5-4 decisions?

KAGAN: Gosh, I don't think that I've expressed any views in my academic writing or anything I can think of on Lopez and Morrison. You know, I've given a lot of speeches in my life, but, you know, I can't think of anyplace where I specifically addressed those issues.

I think that they are settled law, that they are part of the jurisprudence of the commerce clause going forward.

SESSIONS: Could I ask you about that? You've said that it's settled law with regard to the gun case, Chicago, McDonald and Heller. Those were 5-4 cases. Does your definition of settled law mean anything more than the normal precedent you would give to any of those kind of 5-4 cases?

KAGAN: I think I've actually used that phrase with respect to a number of cases which people have asked me about. Those are a couple. But...

(CROSSTALK)

SESSIONS: ... use the phrase interchangeably, "precedent," which has a certain amount of power, and then you've thrown out "settled law," to the layman seems to be a more firm acknowledgment of the power of that ruling.

But I want to know, do you mean any difference when you use those two phrases?

KAGAN: I don't mean any difference. What I mean to say when I use those phrases is, these are decisions of the court, they are decisions of the court that are entitled to all the weight that any decision of the court has as precedent going forward, that I have no thought, no agenda, no purpose, no, you know, remotely no plan to think about reversing any of them, that these are cases that I accept as decisions of the court going forward.

SESSIONS: All right. Well, and Justice Sotomayor said a similar thing about the Heller case, and it didn't bother her one bit to be in the dissent in the McDonald case Monday.

So you're not saying that you're binding yourself to be a 6-3 vote with now six members of the Supreme Court on the gun cases, and you're not binding yourself and suggesting you feel bound by Lopez and Morrison, are you?

KAGAN: Senator Sessions, it wouldn't be appropriate for me to bind myself with respect to any future case that came before me. It wouldn't be appropriate for me in any case to say, "Oh, I promise that I'm going to take a case like that and do, you know, X, Y, Z with it." That wouldn't be appropriate.

SESSIONS: Well, I think that's what I expected, and I think any -- I think you'll go to the court free to vote either way on any of those cases, and we should fully understand it.

Thank you.

LEAHY: Thank you very much.

(inaudible) my time, but I will take a minute of my time to put into the record a letter sent to Senator Sessions and myself, a letter of support for the solicitor general.

We get this from 1st Lieutenant David Tressler (ph), who's currently deployed with the U.S. Army Reserve in the Khost region -- province -- in Afghanistan.

1st Lieutenant Tressler (ph) is a 2006 Harvard Law School graduate. He was recruited by the military during Solicitor General Kagan's tenure as dean, enlisted in the Army Reserve after his graduation. He's now employed at a combat outpost in Afghanistan. Senator Graham, who's been in that area, as I have and several others, knows it.

He writes, "There was a legitimate legal debate taking place in the courts over the Solomon amendment, and when court decisions allowed it in 2004, Kagan made a decision to uphold the school's anti-discrimination policy.

"Military recruiters were never banned from the campus. During the brief period when recruiters were not given access to students officially through the law school's Office of Career Services, they still had access to students on campus through other means.

"Immediately following this period, in 2005, more graduating students joined the military -- more graduating students joined the military than any year this decade.

"Her," meaning you, "position on the issue were not anti-military and did not discriminate against members or potential recruits of the military, nor do I believe that they denied the military much-needed recruits in time of war."

He continues, "I've heard," referring to the solicitor general, "Elena Kagan speak several times about this issue. She always expressed her support for those that serve in the military and encouraged students to consider military service.

"It was clear she was trying to balance the institution's values underlying its anti-discrimination policy with her genuine support for those who serve or were considering service in the military. Indeed, her sense of DATT injustice seemed to grow out of her belief in the importance of military -- importance and value of military service. I remember that she repeatedly said such while dean."

And then he concludes his letter -- remember, this is addressed to Senator Sessions and myself - - "I urge you to maintain that focus for the remainder of the hearings and refrain from further hyperbole questioning Ms. Kagan's support for the men and women of the U.S. military. I believe that while dean of Harvard Law School she adequately proved her support for those who had served, were currently serving, and all those who felt called to serve, including those, like me, who joined upon graduation, as well as those patriots who were not permitted to do so under the policy of 'don't ask/don't tell.'"

I'll put that letter in the record, and I reserve the balance of my time.

And, Senator Hatch, it's over to you.

HATCH: Well, thank you, Mr. Chairman.

Welcome again. Happy to see you.

Let me just say some of my colleagues and my friends on the other side are really taken aback by some of the arguments on Citizens United and some of the other cases. I'd just like to kind of set the record straight on some of those Democrats' efforts to paint the Roberts court as a conservative activist court.

I think those efforts fall short of even the most basic factual scrutiny. The rulings in question were firmly grounded in the law, the Constitution and relevant precedent, and in fact some of the so-called examples of, quote, "conservative activist," unquote, opinions pointed to by Democrats were enjoined (ph) by some of the most liberal members of the court. And in the most oft cited case, Citizens United, the ACLU sided with the conservatives on the court.

Take the Exxon Shipping Company v. Baker case. This decision was written by none other than Justice David Souter. Nina Totenberg of National Public Radio called David, quote, "a full-fledged member of the court's unabashedly liberal caucus," unquote.

In that case, the court merely held that under maritime law, which we all know is largely judge-made, punitive damages could not exceed actual damages of \$1 billion.

You know, I see a lot of beating of the breast on these things. Let's just take the Citizens United case -- this is an important case -- v. the Federal Election Commission.

Of the cases usually cited in Democratic critiques of the court this is the only one in which the court actually struck down an act of Congress. It did so for a simple reason: The law passed by Congress violated fundamental law, the First Amendment of the United States of America, the United States Congress -- or Constitution, excuse me.

HATCH: The law in question prohibited the broadcast of political speech critical of politicians in the run-up to an election.

In defending the law, I might add, Solicitor General Kagan and her office argued that the government had the authority to prevent the publication of movies and other forms of political speech, such as even books or pamphlets, although General Kagan did limit her take to -- to pamphlets at the time, those books, movies or pamphlets that advocated for or against candidates.

Even the liberal American Civil Liberties Union brought a brief arguing that the law was facially unconstitutional and a poorly conceived effort to restrict political speech that should be struck down.

Now, faced with a law through which Congress exceeded its authority, the courts applied the Constitution and struck down the law. The majority's opinion in Citizens United was not an act of judicial activism. It was an act of correction, overruling a 20-year-old case erroneously decided by

five Justices who clearly substituted their policy views on how elections should be conducted for -- to -- to the dictates of the First Amendment.

Now, the court simply returned the doctrine is espoused in the 1976 case of *Buckley v. Valeo*, which said that, quote, "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," unquote.

Now, this is then important point, I think, that just has to be pointed out. Democrats' claims that *Citizens United* overruled 100 years of precedent is simply and true. The 100 years claim points to the Tillman Act passed in 1907, which barred contributions, namely, given to candidates. *Citizens United* was about expenditures, money spent on independent advertising.

The first federal law limiting corporate and labor union expenditures was not passed until 1947 and was not addressed by the Supreme Court until the 1970s. Plus, I'd point out there are at least 25 cases that were precedential that *Citizens United* basically backed.

Now, to get to you, General Kagan, let me just say this. I also want to look briefly at another free-speech case. That's *United States v. Stevens*. The defendant argued that the federal statute prohibiting the sale of depictions of animal cruelty was unconstitutional. In your brief defending the statute, you made this argument. Quote, "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs," unquote.

Now, in its -- in his opinion for the court, Chief Justice Roberts responded to your theory this way. Quote, "As a free-floating test for First Amendment coverage, that sentence wherein you stated that that whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs," unquote, he said that -- that "as a free-floating test," he said, "for First Amendment coverage, that sentence is startling and dangerous," unquote.

Now, I know you were representing your client, the United States, in this case, but you certainly did not have to make that unusual argument. Now, here's why I'm concerned about it. It sounds a lot like other subjective theories that give judges a lot of power that you have discussed in your law journal activities.

Whether it is focusing on hidden subjective motives rather than actual objective effects, imposing restrictions based on the identity of the speaker, or here basing freedom of speech on an assessment of value and costs, I'm really troubled by how much power your arguments and theories appear to give to judges. Now, am I wrong to be concerned about this?

KAGAN: Senator Hatch, I -- I think you are wrong to be concerned about it. Let me first talk about the *United States v. Stevens* brief. It's been a hard case. Congress had passed a statute, and it was a statute designed to deal with horrific acts of animal cruelty, including these things that I didn't know existed, these crush videos...

HATCH: That none -- that none of us would like, that's for sure.

KAGAN: But it was -- it was a statute that -- that was -- I hesitate to criticize Congress' work, but it was a statute that was not drafted with the kind of precision that made it easy to defend from a First Amendment challenge. And we thought that our best argument, really -- or, you know, the only argument that we had was to analogize the statute to other categories of expressive activity that the court had held were simply not protected by the First Amendment.

And most notably, the two categories that we used in that -- that brief were obscenity and child pornography. And those are categories where I think the court has done this kind of categorical balancing that I spoke of, that, you know, we spoke of in the -- in the brief, where the court has said, look, when it comes to obscenity or child pornography, child pornography is a -- is an especially apt example, because the -- the harm that Congress was trying to get at here, what Congress was trying to do, was to turn off the -- the spigot of distribution so that these materials would not be made in the first place.

And that was the theory that the court used to say that child pornography could be regulated under the First Amendment, that if we shut down the mechanisms of distributing and -- and -- this material, nobody would produce this material. And that's what Congress -- that that was clearly Congress is focus in -- in passing this animal cruelty statute.

And so what we tried to do was to analogize this statute to the child pornography laws that the court had upheld in *Ferber* and to say that the court should uphold the statute for the identical reason that it upheld the child pornography laws, that the court should realize the extraordinary harms of this -- of this speech and should realize the way in which this regulation is really aimed at stopping the initial production, the initial horrific acts that went into the production of the speech. And that was -- that was the government's view.

It was a view that was accepted by Justice Alito in the case. He was the only vote we got, but -- but he essentially accepted that theory. I think it was a very hard case, because it was -- again, I hesitate to criticize Congress' work, but it -- it -- another statute would've been easier to defend on First Amendment grounds, but we tried to do the best we could with it.

HATCH: You and I agree on that.

I still have just a couple of questions about the military recruiting issue. You said yesterday that, quote, "The only thing that was at issue was essentially the sponsoring organizations, whether it was the Office of Career Services or instead the Student Veterans Organization," unquote.

Now, it seems to me, though, that in addition to who sponsors the recruiters, the real question was what they were able to -- to offer.

KAGAN: I'm sorry. What they were able...

HATCH: ... what -- what they were able to offer. The law, after all, says nothing about sponsors, and it says nothing about whether recruiting goes up or down in a particular time period. The law requires the same access to campus and students for the military as other employers receive.

The Harvard Law School Veterans Association has said that they had a tiny membership, meager budget, and no office space. All they could do was facilitate a few student-initiated contacts with military recruiters. All they could do was establish an e-mail account to receive inquiries from students.

Now, is this what -- is that what you referred to yesterday as, quote, "full and complete access to our students," unquote? And did you believe that this was an equal substitute for what the Office of Career Services provided for all other employers -- all other legal employers?

KAGAN: Senator Hatch, I -- I did believe that it was an equally effective substitute, that what our Office of Career Services does -- they do a good job, but what they do is basically no more than to ensure that students know when a military -- excuse me, when an employer of any kind is coming and to enable the student and the employer to hook up with each other.

And that's what our Office of Career Services do. We -- we have upwards of 700 or 800 employers that come to our campus every year. And what the Office of Career Services does is to make sure that students know when those 700 or 800 employers are coming and where they are going to be, and to make sure...

HATCH: But you have to -- you have to admit that -- that the facilities weren't as available to the military, to the recruiters, that they would've been with the office -- the office that you're describing.

I mean, let -- let me make that point a little bit more clear, maybe. Yesterday, you also said that the military -- quote, "The military at all times during my deanship had full and good access," unquote.

Now, the judge advocate general's office, however, stated that without access to the office of career services, quote, "We are relegated to wandering the halls in hopes that someone will stop and talk to us. It is our view that denying access to the career services office is tantamount to chaining and locking the front door of the law school, as it has the same impact on our recruiting efforts," unquote.

Again, I'm not asking whether recruiting went up or down or whether there was some access to something at all time, but the law requires the same access for the military as other employers, not access that the dean may consider good.

Do you disagree with this description of the situation by the office of the judge advocate general?

KAGAN: Senator Hatch, I appreciate that reasonable people can disagree about this issue, but I do think that the military at all times -- regardless whether it was, whether the office of career services was sponsoring or the veterans association was sponsoring, had excellent access to our students.

And over many years prior to my deanship, the veterans association had sponsored, the Department of Defense had thought that that sponsorship was fully adequate to their needs, and I think that there are other documents in those records which suggest that, which suggest, you know, the Department of Defense going in and saying, "We met with a lot of people, and it was great, and we very much appreciate the access that we were getting."

The office of career services really exists as a kind of -- it makes sure that students know that employers are coming, and it makes sure that students have the opportunity to talk with those employers.

The veterans association did a fabulous job of doing the same thing. And so I do think that the military recruiters had excellent access either way and -- and, in fact, that semester in my deanship, the one period of 12 in which the veterans association did sponsor the interviews, in that year, military recruiting did go up. And -- and I do think that the, you know, effects, in some sense, speak for themselves.

HATCH: OK. Well, let me switch topics again, this time to abortion. When Congress debated the ban on partial-birth abortion, one issue was whether this particularly gruesome abortion method was medically necessary. The American College of Obstetricians and Gynecologists, or ACOG, they call it, is a natural source of medical opinion on this subject.

According to the documents we received, you wrote a memo to your superiors in the Clinton White House about this. You noted that the American College of Obstetricians and Gynecologists were considering a statement that its experts panel found no circumstances under which partial-birth abortion was the only option for saving the life or preserving the health of the woman.

You wrote, quote, "This, of course, would be a disaster," unquote.

That's something that -- that does bother me, because it would be a disaster, you wrote, because ACOG opposed the ban on partial-birth abortion, if anyone ever found out -- and you wrote that it could leak -- even if ACOG did not officially release its original statement, it could have negative political consequences.

So you drafted alternative language that would say that partial-birth abortion, quote, "may be the best and most appropriate procedure in particular circumstances to save the life or preserve the health of the woman," unquote.

Now, that's a very different spin and obviously a more politically useful spin. The ACOG executive board copied your language verbatim into its final statement. Your language played an enormous role in both legal and political fights over banning partial-birth abortion.

The Supreme Court relied on it when -- when striking down the Nebraska ban in *Stenberg v. Carhart*. And I'm really stunned by what appears to be a real politicalization of science. The political objective of keeping partial-birth abortion legal appears to have trumped what a medical organization originally wrote and left to its own scientific inquiry and that they had -- and they had concluded.

Did you write that memo?

KAGAN: Senator, with respect, I -- I don't think that that's what happened here.

HATCH: Well, I'm happy to have you clarify it. I don't -- that's my question. Did you write that memo?

KAGAN: I'm sorry, the memo which is...

HATCH: The memo that basically caused them to -- to go back to the language of medically necessary that was the big issue to begin with.

KAGAN: Yes, well, I've -- I've seen the document. And the document is...

HATCH: But did you write it, that -- your memo?

KAGAN: The document is certainly in my handwriting. I don't know whether the document was a product of a conversation that I had had with them.

(CROSSTALK)

KAGAN: If I could just go back, Senator Hatch.

HATCH: OK.

KAGAN: This was an incredibly difficult issue for everybody who was associated with it, for obvious reasons. President Clinton had strong views on this issue. And what he thought was that this

procedure should be banned in all cases except where the procedure was necessary to save the life or to prevent serious health consequences to the woman. And those were always his principles.

And we tried over the course of the people of time when this statute was being considered actually twice to get him absolutely the best medical evidence on this subject possible. And it was not easy, because as everybody in Congress knows, different people said different things about this, there was conflicting evidence, and we tried to do our best to bring all the evidence, all the conflicting views to his attention.

In the course of that, we did indeed speak with ACOG. ACOG had an interest in this statute, and ACOG had views about the statute.

What ACOG thought and always conveyed to us was two things. What ACOG thought was that, on the one hand, they couldn't think of a circumstance in which this procedure was the absolutely only procedure that could be used in a given case, but, second, on the other hand, that they could think of circumstances in which it was the medically best or medically most appropriate procedure, that it was the procedure with the least risk attached to it, in terms of preventing harm to the women's health.

And so we knew that ACOG thought both of these things. We informed the president, President Clinton, of that fact. There did come a time when we saw a draft statement that stated the first of these things which we knew ACOG to believe, but not the second, which we also knew ACOG to believe. And I had some discussions with ACOG about that draft.

HATCH: My time is about up. Let me just ask that question again. Did you write, quote, "This, of course, would be a disaster," unquote?

KAGAN: The...

(CROSSTALK)

HATCH: ... handwriting. You didn't get that from the...

(CROSSTALK)

KAGAN: No, no, no. You're exactly right. I'm sorry. I didn't realize what you were referring...

HATCH: That's what I wanted to know.

KAGAN: Yes, yes. No, that's exactly right. And -- and the disaster would be if the statement did not accurately reflect all of what ACOG thought, both -- I mean, that there were two parts of what ACOG thought.

And I recall generally, not with any great specificity, but recall generally talking to ACOG about that statement and about whether that statement was consistent with the views that we knew it had because they had stated them, that there was both not the only procedure, but also that it was in some circumstances the medically best procedure.

And in their final statement, that -- that sentence, that it was -- it was not the only procedure, of course, remained, because that is what they thought. But we did have some discussions about clarifying the second aspect of what they also thought, which was that it was in some circumstances the medically most appropriate procedure.

And so I think that this was all done in order to present both to president -- both to the president and to Congress the most accurate understanding of what this important organization of doctors believed with respect to this issue.

HATCH: Mr. Chairman, I just have one or two sentences I'd like to say, and then I'll...

LEAHY: I'll give you extra time.

HATCH: Thank you, Mr. Chairman.

Well, I'll tell you this bothers me a lot, because I know that there are plenty of doctors in ACOG who did not believe that partial-birth abortion was an essential procedure and who believed that it was really a brutal procedure, and it was a constant conflict there.

And -- and, as you know, many in Congress came to the conclusion it was a brutal procedure, too, that really was unjustified. That bothers me that you -- that you intervened in that particular area in that way.

HATCH: Well, that is all I'll say about it, but I just wanted you to be aware of that that bothers me.

KAGAN: Senator Hatch, there was no way in which I would have or could have intervened with ACOG, which is a respected bodies of physicians, to get it to change its medical views on the

question. The only question that we were talking about was whether this statement that they were going to issue accurately reflected the views that they had expressed to the president, to the president's staff, to Congress and to the American public.

I do agree with you. This was an enormously hard issue. And President Clinton found it so, and - and thought that the procedure should not be used except in cases where it was necessary for life or health purposes. And we tried to get him the best information we could about the medical need for this procedure, something that was not always easy, and tried in all of the statements that he made to make sure -- and -- and any statements, other statements that we were aware of to make sure that that information was accurately conveyed to the American public.

HATCH: One of the things that I did as an attorney was represent doctors, including some obstetricians and gynecologists. And I had a lot of experience with them. I hardly met anybody who thought that was a fair or good procedure.

But be that as it may, I just want you to know I'm troubled by it. And even though I care a great deal for you and respect you.

Thank you, Mr. Chairman.

LEAHY: I -- (inaudible), because we are going to finish this afternoon, I did want to give him extra time on that.

On my time, I would -- and I would ask Senator Hatch to stay for this for a moment -- I would like to put into the record a letter of strong support for Elena Kagan's position the committee received from Professor Michael McConnell. He is now director of the Constitutional Law Center at Stanford Law School. Until recently, he was a federal appeals court judge appointed by President George W. Bush to the 10th Circuit, strongly backed by Senator Hatch.

When President Bush nominated Professor McConnell, he was widely regarded as a brilliant law professor. He appeared before our committee. He was championed by Senator Hatch. Despite his provocative writings including staunch advocacy for reexamining the First Amendment jurisprudence, strong opposition to *Roe v. Wade*, strong opposition to clinic access law, and his testimony before Congress that he believed the Violence Against Women Act was unconstitutional, I was assured by his response to our questions that he understood the difference between his role as a teacher and advocate and his future role as a judge. He assured us he respected the doctrine of *stare decisis*, and would be bound to follow Supreme Court precedent.

I supported his confirmation, as did other Democratic senators. He was confirmed. Professor McConnell's approach to the law is thoughtful, but also staunchly conservative. That's why I carefully read his letter to the committee in which he analyzed Solicitor General Kagan's legal philosophy in a number of areas that Professor McConnell views as important to those who adhere to a generally conservative understanding of the role of the Supreme Court in interpreting the Constitution and the laws of the United States.

Professor McConnell concludes, "On a significant number of important and controversial matters, Elena Kagan has taken positions associated with the conservative side of the legal academy. This demonstrates an openness to a diversity of ideas, as well as a lack of partisanship that bodes well for service on the court."

Professor McConnell concludes his letter: "In Elena Kagan's service in the executive branch and her time as dean, she has skillfully navigated political waters, but she has also demonstrated another quality. Publicly and privately in her scholarly work and in her arguments on behalf of the United States, Elena Kagan has demonstrated fidelity to legal principle even when it means crossing her political and ideological allies. This is an admirable and essential quality in a judge."

Now, just as my fellow conservatives asked us to accept Professor McConnell would be -- would uphold the law and asked us, Senator Hatch, to vote for him. They did. I would note that he -- Professor McConnell -- concluded that Solicitor General Kagan deserves not a grudging acquiescence, but an enthusiastic confirmation as an associate justice of the United States Supreme Court.

I would hope that the same credibility that we gave him will be given to her.

HATCH: Mr. Chairman, if I could just add, that is high praise indeed. Because I think Michael McConnell is about as good a constitutional expert and lawyer as we have in this country, and certainly a great teacher.

By the way, just to correct the record, even though he thought the Violence Against Women act was unconstitutional, I was the prime cosponsor, along with Senator Biden.

LEAHY: I know you were. That was his position.

HATCH: So I understand...

(CROSSTALK)

LEAHY: We have about four minutes left in the vote.

HATCH: Thank you, Mr. Chairman.

LEAHY: I would yield to Senator Feinstein.

FEINSTEIN: Thank you very much, Mr. Chairman.

General Kagan, good afternoon. I know this has been a long hearing for you. I have just one question and then a brief statement I would like to make. My question is on the establishment clause. I believe our nation was founded on the principle that the United States would never be a place for religious persecution, and therefore religion and the government would remain separate and independent of each other. And I think that is part of what makes us a strong nation and it also protects us from religious discrimination.

Here is the question, and let me put it all into one. What will be your approach to interpreting the establishment clause of the Constitution? And how do you believe it works with the free exercise clause? And then if you could respond also on the question of standing to sue -- the ability to bring a case in the federal court.

In the case of *Hein v. Freedom from Religion Foundation* that held that taxpayers no longer have constitutional standing to bring challenges to the executive branch expenditures on the grounds that they violate the establishment clause. The problem is if taxpayers don't have the ability to bring a case, who does have the ability to bring a case and allow whether the executive branch is complying with the Constitution?

That is three things at one time, but I think you are probably able to handle them.

KAGAN: OK, Senator Feinstein, I will try.

I guess I will start with the question of the two clauses because both are very important to our constitutional system and neither should be subordinated to the other.

There are times when they are in some tension with each other. Now, I think it is important to recognize that there are many times where that is not so, whereas they in fact go hand in hand and function perfectly well together. But there are some times when they may be in tension and it can cut in either direction.

So suppose that a state -- a state government decides to give what is called a "voluntary accommodation" to some religious person -- essentially a voluntary exemption of that person from an otherwise generally applicable law -- and does that because the law would impose some substantial burdens on that person's religious practice. And the law thinks, "You know what? In those circumstances, we think that the person should be exempted from the law so that the person can follow the dictates of her conscience."

But then somebody comes in and says, "Well, what do you mean you are giving that exception, but you're not giving me an exemption. And -- and why are you making that sort of special accommodation to this -- to this person? That special accommodation must count as an establishment of religion."

And so there you get a claim where there is an accommodation to religious -- to the free exercise of religion, but then there's a claim that that violates the establishment clause part of the First Amendment. And that is the kind of way in which there might be tension.

KAGAN: But what the -- the court has said with respect to this issue -- and there seems to be great virtue in this approach -- is that in order to prevent that from happening or to prevent it the other way, where the state does something in order to -- to advance establishment clause values and then somebody comes in and makes a free exercise claim, either way, what the court has -- has stated is that there needs to be some play in the joints, there needs to be some freedom for government to act in this area without being subject to a claim from the other side, some -- some freedom for government to make religious accommodations without being subject to establishment clause challenges and some freedom on government's part to enforce the values of the establishment clause without being subject to free exercise claims.

And that's not to say how any particular case should come out, because sometimes the state goes too far, but that in general there needs to be a little bit of play in the joints in -- in -- in order to prevent the state from sort of not being able to do anything, from being hamstrung in -- in this area.

As to -- as to what establishment clause test I would use, that is a hard, hard question. Right now, there are a multitude of such tests. The -- the -- the most established one, the oldest one, is the *Lemon v. Kurtzman* test, which is a three-part test focusing on the purpose of a governmental action, the effect of a governmental action, whether the governmental action has the effect -- has -- has the primary effect of inhibiting or advancing religion, and the third part of the test focuses on entanglement between the government and the religious entity.

And many, many justices have tried to kill this test. I think that there have been six individual justices who at least have expressed some skepticism about it.

But it -- it continues on. It has not been reversed. It -- it -- and it's usually the test that the lower courts apply. It's sometimes applied and sometimes not applied by the Supreme Court, very much depending on the circumstances. But it -- it continues to be the -- the -- the test -- the primary test of the court.

Now, other justices have had different ways of approaching this issue. Justice O'Connor famously asked about whether particular actions would be seen by reasonable observers as endorsements of religion. Some of the justices have used a kind of coercion test, asking whether a governmental action coerces a person in the exercise of religion. Justice Breyer has -- has -- has recently talked about religious divisiveness as a way to approach establishment clause inquiries.

And I think that the reason why there are so many tests -- and I don't think that I've mentioned all of them, even -- I think that the reason is that the establishment clause can arise in a very wide variety of contexts with a very wide variety of -- of -- of factual situations and circumstances.

And -- and -- and sometimes one test might seem the appropriate way to analyze the problem, and sometimes another, and it's very hard to say kind of in the abstract which is appropriate, that it's a more -- it's a matter of sort of situation sense, if you will. It's a more contextual inquiry as to what's the approach to use that would make sense.

In general, I think what the -- the both First Amendment clauses are designed to do -- and this is the way in which they work hand in hand with each other -- what they're -- what they're both designed to do is to ensure that you have full rights as an -- as an American citizen, you are a part of this country, no matter what your religion is, and -- and to -- to -- to ensure that religion just never functions as a way to put people because of their religious belief or because of their religious practice at some disadvantage with respect to any of the rights of American citizenship.

So I think that that's the sort of overall purpose of -- of -- of both parts of the amendment.

As in the matter of taxpayer standing, I want to be very careful here, because there is a taxpayer standing issue, as I understand it, that will be before the court next term.

The -- the -- the court has stated that taxpayers generally have standing to make certain kinds of establishment clause claims, specifically claims against congressional legislation, and when -- that a taxpayer can, by virtue of being a taxpayer, can sue to contest governmental actions taken under Congress's power to appropriate money, but -- but that a taxpayer may not have standing to contest executive action just by virtue of being a taxpayer.

Now, that doesn't mean that some may -- that there may not be somebody who has standing to contest such action. I think what the court has suggested is just that the -- the sort of normal injury that Article III requires has to be shown the injury can't come just by virtue of being a taxpayer, but has to come from something else in addition.

But there is a -- I think a case on the docket...

FEINSTEIN: Such as the individual being actually affected?

KAGAN: Yes, exactly right.

FEINSTEIN: Thank you.

You know, I think even the other side would have to admit that you have a wonderfully well-ordered mind. And I've watched you over these days -- when I haven't been right here and I've been able to look at television, I've watched you. And I think your -- your knowledge of the law and your ability to order your answers is really very impressive. And I -- I just want you to know that.

Now I want to say something.

If you were confirmed -- and I believe you're going to be -- you will be only the fourth female justice in history, and the Supreme Court will have three women serving concurrently for the first time ever.

As the first female dean of Harvard, the first woman to serve as solicitor general, you've certainly broken several glass ceilings. However, the fact is many institutions still do not reflect the diversity of our society. And the federal courts, I'm sorry to say, are one of them.

As of last month, only 48 of the country's 163 active federal appeals court judges were women, and women comprised only 191 of 794 district court judges. According to the American Community Survey, a college-educated woman makes approximately \$20,000 less than her similarly educated male counterpart, and the average woman is paid only 77 cents for every dollar a man makes. I remember it when it was 56 cents, so I know there's been progress.

And this is not to say that progress hasn't been made. Women today make up nearly half of all law students, 30 percent of all lawyers. And when I first joined the Senate, there were only two women serving in this institution, and today there are 17 of us. So we're making progress, but every advance, it seems to me, has really been hard-fought.

And I want to say one thing about the Ledbetter case, now that it's history. I found it just shocking that the court would hold to a technicality when a woman couldn't possibly have known during the time that the tolling was taking place that she was disadvantaged. And when she learned she was disadvantaged, it was too late. And for such a substantial time, she had been doing the same work as a man and not been paid for it.

And so I think, as more women are on the highest court, I really believe that, once you cross that threshold and the door is open, it remains open for all time and others will follow.

I wished I had said this to Justice Sotomayor, but I didn't think of it at the time, but, you know, you're a wonderful role model for women and that we'll forget whether you're a Democrat or Republican. You know, you're reasoned, you have a commitment, you have a dedication and a staying power, and you do us all well, and that's what I wanted to say. So thank you very much.

And now I'll recognize Senator Grassley.

GRASSLEY: Do I get to use your unused six minutes?

FEINSTEIN: You want to use my six minutes? You can.

GRASSLEY: I'm joking. Thank you very much.

I want to start with private property.

The takings clause of the Fifth Amendment states, "Nor shall private property be taken for public use without just compensation." The plain language of the Constitution says an individual's property shall not be taken for public use.

Yet, the majority of the Supreme Court case in *Kelo* wrote that the government could take a person's private property for public purpose, not using the word "use," which they determined included private redevelopment of land.

Do you believe that the Supreme Court correctly decided the *Kelo* case or do you believe that the Supreme Court improperly undermined constitutionally protected private property rights?

KAGAN: Senator Grassley, it was obviously a very controversial decision that has inspired a great deal of action in the state legislatures.

I've -- I've -- I've not commented on particular cases, I've not graded cases, but a few thoughts about *Kelo*.

Of course, what -- what the -- what the court in *Kelo* did was to say that the question of public use was not necessarily use by the public, but instead was use for a public purpose. And the court said that in the context of a taking of property that was done pursuant to a broad-scale urban development plan.

So I think it remains an open question whether that public purpose test would apply in any other context without such a broad-scale urban development plan.

You know, one of the things that you learn in your first year of law school in your property class is *Calder v. Bull*. The principle of *Calder v. Bull* is that the government can't take the property of A just to give it to B.

Here what the -- what the court said was that that principle did not apply, but it was very much dependent on this overall urban redevelopment plan. And the question of whether the public purpose doctrine would apply outside of that context is, I think, an open question.

It's also true -- it's also true that in some sense what the -- what the -- what the court did in this area when it said this was to kick the question back into the political process. In other words, the court didn't say, of course, that the government had to do such takings. What the government said was that a state was permitted to do so.

And what states have done in the wake of that decision, in a -- in a -- in a very striking manner, I think, is to say, "Thanks, but no thanks, you know. We don't want that power. We don't want to be -- we don't want to do this. We think doing this, taking property from one person to give it to another person, even in the context of a broad redevelopment plan, is not appropriate public policy."

And so a number of states, I know -- I don't know the exact number, but quite a number -- have passed these kinds of anti-Kelo legislation, which makes sure that the -- that the question never arises because the state government doesn't try to effect such a taking in the first instance.

GRASSLEY: Are there any limits on the public benefit doctrine?

KAGAN: Well, I do think that Kelo only talked about that doctrine in the context of this urban development plan. So I think that the limits are the limits suggested by the Kelo fact themselves. I don't think that the court went beyond those facts in its decision.

GRASSLEY: Under Kelo, the court said that the pretextual (ph) takings are still unconstitutional violation of public use doctrine. Could you give me an example of a condemnation that's an unconstitutional pretextual (ph) taking?

KAGAN: Gosh, you know, I don't remember that exact line from Kelo. So I'm a little bit guessing as to the context.

But I think probably what the court meant was a taking that the government does not truly to serve a public purpose, but instead more to give the property to another individual person, the kind of Calder v. Bull scenario, take property from A, give it to B, under the guise of a public purpose.

So I would think that that's what the court meant, although I don't recall that exact statement. And I think that that also would provide a limit of the kind you're speaking about on the doctrine.

GRASSLEY: Can you think of any areas where, in your opinion, the Supreme Court has failed to provide adequate protection of constitutional property rights? And if you can think of any, then I'd like to know examples -- or an example.

KAGAN: Well, you know, I've tried very hard, Senator Grassley, not to suggest where I see deficiencies with -- in -- in -- in the court's handling of cases. So I think, you know, I think I won't answer that question with that degree of specificity.

I mean, it is quite clear that the -- that the Constitution does in various ways, and most notably by the takings clause, protect property rights, and that the job of the courts in -- with respect to those rights, as any other, is to ensure that government does not overstep its proper bounds.

GRASSLEY: The president who appointed you, in "Audacity For Hope," his book, said our Constitution places the ownership of private property at the very heart of our system of liberty. Do you agree with that statement?

KAGAN: Well, I do think that property rights are a foundation stone of liberty, that the two are intimately connected to each other in our society and in our history.

GRASSLEY: I want to -- I want to bring up Second Amendment again.

In Printz v. U.S., the Supreme Court held that Congress could not order state and local chief law enforcement officers to conduct federal background checks on handgun purchasers.

In March '97 memo, Dennis Burke (ph) wrote that based upon a suggestion from you, he asked the Department of Treasury and Justice to provide options on what the president could do in this area by executive action.

As an example, he cites your suggestion that the president by executive order might -- might be able to prohibit a federal firearms dealer from selling a handgun without local law enforcement certification.

In other words, the president could prohibit handgun sales by licensed dealers even if the Congress could not force the states to do so.

So this raises a fundamental issue not only in terms of the Second Amendment and the 10th amendment, but suggests a power the president has to make laws on his own.

Was it your position that the president has authority by executive order to prohibit federal firearms dealers from selling handguns without local law enforcement certification?

KAGAN: That was not my position, Senator Grassley. And if we could just step back a moment.

GRASSLEY: I have a memo down that I want to bring to your attention, although I accept what you say. But the final paragraph of a memo to Michelle Krisky (ph), I guess it is.

"Based upon Elena's suggestion, I have also asked both Treasury and Justice to give us options on what the president of the United States could do by executive action. For example, could be by executive order" -- "could he by executive order prohibit the FFL from selling handgun without the local law enforcement certification." It uses the acronym CLEO there. "We will continue to pursue."

KAGAN: Right. So let me just step back for a moment.

This was of course -- President Clinton was very committed to the Brady law, which was a way of ensuring that guns were kept out of the hands of criminals, were kept out of the hands of insane people by doing background checks on people before they could receive access to guns. It was a law, of course, with very wide support in Congress and across the country.

It remains in effect today.

The court in Printz, there was -- there was a -- a system, a federal system that enabled gun dealers to do those background checks, but it had not yet come into effect. I think it came into effect in 1998, and there we were in 1994 or 1995 or '96 or something like that.

And in the interim, before the federal system was ready to operate in order to implement the Brady law, what had -- what had happened was that the -- the Brady law had required states to themselves do the background checks, the CLEOs, the chief law enforcement officers of each jurisdiction, were required to do the background checks.

And the court in Printz held that system unconstitutional, said that that was a violation of the 10th Amendment because it inappropriately commandeered state officials for federal purposes.

And what that meant was that there was a kind of gap. The -- the Congress could not require the state officials to do the background checks, but the federal system -- it's called the -- I think it's the insta-check system (ph) or something like that -- the federal system had not come into effect. So the question was what to do in that period of -- I don't know, it was like 18 months or two years -- to ensure that background checks could be done consistent with the Brady law.

And what I suggested to Mr. Burke in that memo was to say, let's see if there are any ways in which the president can take executive action to put in place some kind of interim system. That executive -- to do background checks -- again, that executive action of course had to be consistent with the law, of course had to be consistent with any statutes that Congress had passed, Brady or anything else, and had to be consistent with the Constitution, as well.

As -- as I recall -- and it's many moons ago, obviously -- we didn't find any way to do that. I'm trying to think of exactly what did happen in that interim period. I think for the most part states voluntarily did what they had been doing and -- until the federal system came into play and sort of mooted out the whole inquiry.

GRASSLEY: You didn't have any predilections that the president could do that, that only Congress can do that? I think that's what you just told me.

KAGAN: Yes, the president could only do it if Congress -- if legislation authorized him to do it. If legislation did, you know, that's fine. If -- if there was no legislative authorization, then he couldn't do it.

GRASSLEY: I think my last question in this area is obvious, but let me ask it anyway. In light of both Heller and McDonald, do you still believe that the executive branch has the power to -- well, I shouldn't use the word "still," because I think you cleared that up for us -- but do you believe that the executive branch has the power to prohibit the sale of firearms without legislative authorization?

KAGAN: As I said, I -- I -- I never believed that the president had the power to prohibit that without legislative authorization, so -- in fact, that's one that Heller and McDonald don't effect, that the president didn't have that power before and doesn't have that power after.

GRASSLEY: OK. On the Second Amendment dealing with self- defense, the historical background surrounding the Second Amendment strongly supports the concept that self-defense is a pre-existing fundamental right.

William Blackstone, who the Supreme Court has called, quote, "the pre-eminent authority on English law for the founding generation," end of quote, cited the arms provision as, quote, "one of the fundamental rights of Englishmen," calling it, quote, "the natural right of resistance and self-preservation, the right of having and using arms for self-preservation and defense."

During her confirmation hearings, Justice Sotomayor testified that she couldn't think of a constitutional right to self-defense. Rather, it is defined in criminal statutes by state laws.

So, question: Is self-defense a pre-existing fundamental right? Is it a notion created in the law as an affirmative defense in criminal statutes?

KAGAN: Senator Grassley, I've never had occasion to -- to -- to look into the history of this matter. What I do know is that Heller has stated very specifically that self-defense is the core of the Second Amendment right, which Heller has held confers an individual right to bear arms, and -- and -- and the majority opinion in Heller really does speak of self-defense as the central element of that right.

GRASSLEY: Yes. And let me introduce here the quote specifically, quote, "deeply rooted in this nation's history and traditions," end of quote, from Heller.

KAGAN: Right. And that is, you know, a central part of the rationale of Heller and is settled law in the ways that I've expressed going forward.

GRASSLEY: OK. I'll move on to marriage as a state issue. Do you believe that marriage is a question reserved for the states to decide? And I'm only seeking your opinion, because I know there might be cases coming down the road. Do you believe that marriage is a question reserved for states to decide?

KAGAN: Senator Grassley, there -- there -- there is, of course, a case coming down the road, and I want to be extremely careful about this question and -- and not to in any way prejudge any case that might come before me.

GRASSLEY: That's your right. So you don't want to say any more. Is that what you're saying?

KAGAN: I think I'll leave it there, given the...

GRASSLEY: Well, then let me follow up. Do you agree that the Supreme Court's decision in *Baker v. Nelson*, 1972, holding that the federal courts lacked jurisdiction to hear challenges to state marriage laws, quote, "for want of a substantial federal question," end of quote? Do you -- do you -- do you agree with that decision? Why or why not? Is it settled law, in other words?

KAGAN: So I think that that -- my -- my best understanding is that that decision has some precedential weight, but -- but not the weight of a -- of a, quote, unquote, "normal decision."

What that decision was, it was done under the court's then- mandatory appellate jurisdiction, and it dismissed the case for want of a substantial federal question. And it dismissed it summarily without hearing arguments or -- or -- or reading briefs or -- or -- or whatever, just saying it was not going to accept the -- the -- the case under its then-jurisdictional powers.

My understanding is that there's actually a question about what kind of precedential weight such a decision is entitled to and arguments on both sides of that. I think, you know, probably the better view or the -- the -- the view that most people hold, I think, is that it's entitled to some precedential weight, but not the weight that would be given to a fully argued, fully briefed decision.

GRASSLEY: So based on *Baker v. Nelson*, using your words, it's not really settled law, even though a one-sentence statement as precedent, it says the appeal is dismissed for want of a substantial federal question. That's a pretty simple decision to be based on Supreme Court, but you're saying that this may not be settled law?

KAGAN: Well, my understanding is that there's sort of a -- a -- a question about the precedential effect of those kinds of summary dispositions. And my -- what -- what I think is true is that most people think that those kinds of summary dispositions have some precedential weight, but not the precedential weight that's given to a fully-argued and fully-briefed decision.

GRASSLEY: Well, the decision involved the 14th Amendment that was ratified, as you know, back in 1868, and the case was decided in 1972, to what has changed in the 14th Amendment since

then to warrant a new review under the 14th Amendment that this might not be a federal question or that this is not a federal question.

KAGAN: Senator Grassley, I think that the -- that the task for a court is -- is, you know, to decide a case that comes before it, a case might come before it or might not come before it. If it does come before it, the question will be to -- you know, to consider the facts, to consider the arguments that are made, to -- to hear the -- to -- to read the briefs.

GRASSLEY: In regard to that in stare decisis and all that stuff, what weight would you give to Baker v. Nelson?

KAGAN: Well, as I suggested, Senator Grassley, I -- I -- I first -- I think that there is a question about the precedential weight to be given to summary dispositions. And I would very much want to hear argument and hear briefing about that question and to talk to my colleagues about that question.

My -- my best understanding is that what most people think is that the summary dispositions get some precedential weight, but they -- and -- and -- but they don't get the full weight that a fully briefed, fully argued decision get.

And there is -- you can see why people might think that is because part of the reason that a decision counts as precedent is because it really has been fully considered, that the briefs have been read, that the arguments have been heard, that the judges have had a chance to talk with each other. And the question is whether a summary disposition, because it's done kind of, you know, without all that process, gets the full precedential weight.

As I said, this is -- this is not a question on which I've thought deeply. I'm -- I'm sort of expressing to you my best understanding of what I take to be kind of the consensus position on this, but it's obviously the question on the precedential weight of that summary disposition is itself a question for the courts to consider. And -- and I would do so in the -- in the usual way.

GRASSLEY: I would only say that I'm disappointed that you didn't use the words "settled law," the same definitive matter in regard to Baker versus Nelson, as you have so many other times in the last two days. And, well, that's it.

LEAHY: Well, actually, the -- the answer she gave was basic hornbook law, the -- the generally accepted -- totally accepted hornbook law. But did you have another question on that, because...

GRASSLEY: No. No.

LEAHY: Then, Senator Specter?

Then after Senator Specter finishes, again I'd urge senators if you don't feel you need the whole 20 minutes -- I've allowed some of the Republican senators to go over the 20 minutes, because -- so they could finish up their questions, but if you don't need the whole 20 minutes, it will not hurt my feelings or the nominee's feelings if you don't use it. We will then break for lunch immediately when Senator Specter finishes.

SPECTER: Thank you, Mr. Chairman. I believe that I can finish in less than 20 minutes and yield back some time.

When I finished my first round, Solicitor General Kagan, I was asking you about what cases the court would take, what you would do to grant certiorari. I went through a number of matters where the power of Congress had been curtailed when the court took over the fact-finding position. But a great deal of what the court decides is on the cases they decline to take.

And I want to talk to you initially about two cases, the Holocaust survivors and the survivors of victims of 9/11, two cases that you are intimately familiar with, because you worked on them as solicitor general, and I've raised these with you in our informal meeting and again by letters, which I sent you.

And here I am not asking how you would decide a case, but only whether you would vote to take the case up for a decision by the court. The Congress, as I mentioned briefly earlier, has the power to direct the court to take certain cases, as the Congress did with the McCain-Feingold, the flag burning case, Federal Fair Labor Standards Act.

The Holocaust issue was the one where Holocaust victims suffer terribly, brought lawsuits against an Italian insurance company, and the administration took the position that the Supreme Court should not hear the decision by the Court of Appeals for the Second Circuit, which decided that

the claims were preempted by an executive branch foreign policy favoring a resolution of such claims through an international commission.

Well, that seems like a wrong decision to me. You have an insurance policy. Insurance company won't pay on the claim. You ought to be able to go to court and sue them, and not to have the governments of the two countries decide what you can sue. But in any event, it is a different issue as to taking the case.

Without asking you how you'd decide it, would you vote to have the Supreme Court consider that case?

KAGAN: Senator Specter, this is difficult for me, because I -- as I understand this, this is a -- a live case, and I continue to represent one of the parties in this case. In other words there may very well be a petition for certiorari in this case. But I continue to be solicitor general and -- and would head the office that would have to respond to that petition. And I think that...

SPECTER: If you were on the court, you would recuse yourself. This would be one of those cases, wouldn't it?

KAGAN: That is -- that is true, Senator Specter, but -- but I don't -- I don't want to count my chickens. And before I am confirmed, I -- I still am solicitor general, and I'm the counsel of...

SPECTER: Ms. Kagan, you're -- you're counting your chickens right now. I'm one of your chickens, potentially.

(LAUGHTER)

Reminds me of the Churchill -- the Churchill speech to Canada -- some neck, some chicken.

KAGAN: I -- I think I remain solicitor general unless and until this body confirms me, and that means I remain a party in this very case that you're -- that you're asking me about.

SPECTER: Ms. Kagan, I'm asking you how you would decide a case, how you -- what you would decide on taking the case. Would you hear this case or not?

KAGAN: I -- I think I'm going to be responsible for responding to the petition for certiorari in this case as solicitor general, unless I'm confirmed to the court. And while I'm solicitor general, I -- I don't think that I can say how it would vote on a -- on a cert response that the solicitor general will be filing.

SPECTER: Well, Ms. Kagan, I don't see why not, but the clock is running. I'm going to move on.

The next identical question involves a lawsuit brought by the survivors of the victims of 9/11. And there the Court of Appeals for the Second Circuit said that the -- a foreign immunity statute, which excluded tortious conduct like flying a plane into a building, did not apply. Congress had spoken that a country like Saudi Arabia should be liable for this kind of tortious conduct, and the Second Circuit said no, because the kingdom of Saudi Arabia had not been placed on the -- the terrorist list.

Well, it has nothing to do with the statute. Then as solicitor general, you said that the Second Circuit was wrong, but the Supreme Court ought not to hear the case, because the conduct by the Saudis was outside the country, but the impact was inside the country.

And the question is would you think that case ought to have been hurt by the Supreme Court? As a justice, would you vote to take that kind of a case?

KAGAN: Senator Specter, the -- the government did argue, based on very extensive consultations, that the Supreme Court ought not to take that case, and that continues to be the government's position. And -- and, you know, I don't think it would be right for me to undermine the position that we taken that way by suggesting that it was wrong.

It was, in fact, a -- a position of the United States government in line with the interests of the United States government that it authorized and that I thought was -- was appropriate for a number of reasons, which -- which I'm happy to talk about with you.

But -- but I -- but I -- I can say -- I mean, I've -- I've not said with respect to any of -- I think that the decisions that I made as solicitor general on behalf of the United States government as my client are -- are ones that I can't undermine in this -- and this hearing room.

SPECTER: Ms. Kagan, candidly, I don't think that is any reason not to respond to my question, but I'm going to move on.

We didn't quite finish my question to you of the same nature about whether, if confirmed, you would vote to take the case involving the Detroit federal court decision on the terrorist surveillance

program, which the Sixth Circuit ducked on standing grounds with a powerful dissent. The Supreme Court denied cert.

Would you have voted to take that case? You gave me three categories of cases, but I understand your three categories of cases, but again that doesn't answer the question. Would you vote to take that kind of a case?

KAGAN: Well, Senator Specter, I -- I do think that this is a case that, as I understand it, generally falls within the third category of case, a case which presents an extremely important federal issue as to whether the executive has overstepped its appropriate authority and essentially has flouted legislation in the area.

The sort of curlicue on this case does have to do with the standing question, with the question whether the court has jurisdiction and could reach the merits question which is of such importance.

SPECTER: You said all of that yesterday. Would you take the case?

KAGAN: Senator Specter, I've -- I've not read the petitions. I've not read the briefs in the way that I would as a judge. I do think that the standing issue itself is of some real importance, and it's of some real importance because it goes to the question: Who does have standing to challenge surveillance policies when the very notion of those surveillance policy -- when -- when -- when those surveillance policies are confidential and you don't know whether you're being surveilled?

And if nobody does have the ability to come in and say, "Look, I have reasonable grounds to believe that I'm being surveilled." If instead one has to show that one absolutely has been surveilled, that really does -- that very much detracts from the ability to ever reach the merits question of whether the surveillance is appropriate.

So I think for that reason, you know, the standing issue is of significant importance as well.

SPECTER: I -- I'll move on. You've had a lot of time to take a look at that. We met weeks ago. I sent you a letter. But apparently I'm not going to get an answer there either.

Let me come back to a question which ought to fall squarely within the Kagan doctrine of answering the substantive question. None of these other reasons would apply. We have the rational basis test for deciding whether a record is adequate -- Maryland Works (ph), which I talked to you about, Justice Harlan. You have the congruence and proportionality standard.

Those don't involve specific cases as to what you would decide. They involve standards. And certainly that comes within your ambit of answering a substantive question. Which would you apply if confirmed?

KAGAN: Senator Specter, as I understand it, the congruence and proportionality test is currently the law of the court, and notwithstanding that it's been subjected to significant criticism. And notwithstanding that it's produced some extremely erratic results. And I can't, you know, sit at this table without briefing, without argument, without discussion with my colleagues and say, "Well, I just don't approve of that test. I would reverse it."

What I can say is that I understand the criticisms that have been leveled against that test. There seems to me real force in the notion that a test in this area dealing with Congress' section 5 powers really needs to provide clear guideposts to Congress so that Congress knows what it can do and knows what it can't do. And so the goal posts don't keep changing and so, you know, Congress can do what -- can pass legislation confident in the knowledge that that legislation will be valid. And I think that those concerns are of very significant weight.

And the question for the future on the court will be whether those concerns can be met under the test that's now in existence.

SPECTER: Ms. Kagan, if you have to discuss with your colleagues the kinds of questions that we're raising, that I have just raised, you wouldn't answer anything, and perhaps you haven't answered...

KAGAN: Well, Senator specter, I certainly do have to read briefs and...

SPECTER: And perhaps you haven't answered much of anything.

KAGAN: Senator Specter, I -- I do have to read briefs and listen to arguments and discuss...

SPECTER: Why do you have to read briefs on a standard? This is not a specific case.

KAGAN: This is...

SPECTER: This is a standard as to whether the rational basis is sufficient or whether you're going to have congruence and proportionality.

KAGAN: Senator Specter, the congruence and proportionality test has been a standard that's been adopted by the court that is precedent going forward. And you shouldn't want a judge who will sit at this table and who will tell you that she will reverse a decision without listening to arguments and without reading briefs and without talking to colleagues, notwithstanding that that person knows that that test has been subject to serious criticism.

SPECTER: Well, Solicitor General Kagan, I think the commentaries in the media are accurate. We started off with standard that you articulated at the University of Chicago Law School about substantive discussions. And they say we haven't had them here, and I'm inclined to agree with them. The question is where we go from here. You have followed the pattern which has been in vogue since -- since Bork. And you quoted me in your law review article that someday the Senate would stand up on its hind legs.

It would be my hope that we could find someplace between voting no and having some sort of substantive answers. But I don't know that it would be useful to pursue these questions any further. But I think we are searching for a way how senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting no.

The other issue which I discussed with you at some length, and I'm going to wrap up and yield back some time here in a minute or so, and that is: What, if anything, can be done about nominees who drastically abandon positions taken at the confirmation hearings? And there, I'm pleased with your response on television. Brandeis in the famous article he wrote in 1913 talks about publicity, and that is why I think television would be so good to tell the public what is -- what is going on.

I would like to put into the record the questioning that I made of Chief Justice Roberts which took 28 of my 30 minutes, and his concurring opinion in Citizens United which is an apology, a really repudiation of everything he testified to, just diametrically opposed. That concurring opinion goes into great detail as to why stare decisis ought not to be followed. I'd like to have that in the record, Mr. Chairman.

LEAHY: Without objection.

SPECTER: I again acknowledge it's a big difference between appearing here at a nomination proceeding as opposed to deciding a case in controversy. And I don't challenge Chief Justice Roberts's good faith, but it does leave us perplexed as to where we're at.

Mr. Chairman, I thank you.

Solicitor General Kagan, thank you.

Mr. Chairman, I yield back the balance of my time.

LEAHY: Thank you.

And we will -- we will recess. It's now 1:10. Let's be back here about 2:10.

Thank you. We stand in recess.

(RECESS)

LEAHY: I welcome every -- everyone back.

I couldn't help but notice that General Claudia Kennedy is in the second row, the first woman to achieve the rank of three-star general, United States Army.

And the whole thing will be put in the record, but I appreciate very much, General, what you wrote. I'll just read one paragraph of it.

General Kennedy says, "I commanded both intelligence and recruiting units during my career in the military. Based on my experience in military recruiting, I'm completely confident that Elena Kagan is a strong supporter of our men and women in uniform and appropriately handled military recruiting policies at Harvard Law School by ensuring they had full access to the student body during her tenure. I'm pleased to be here today to lend my support to her confirmation."

Of course, we'll hear more later, but that will be part of the record.

And I believe, Senator Kyl, you're next.

KYL: Once again, we play to a packed crowd here.

LEAHY: Well, that's because -- I think everybody has asked most of the questions, but if somebody has a few more.

KYL: Well, Mr. Chairman...

KAGAN: (inaudible) the emphasis on a few.

KYL: Yes, I've actually got some different questions.

And because of the limited time, I will ask you please be as succinct as you can. And I may interrupt you if I feel we have to move on.

Let me, first of all, ask you about a letter that Senator Graham raised with you but did not ask the two questions I have, November 14th, 2005. This related to an amendment that he and I and Senator Cornyn had filed to limit the jurisdiction of the courts on habeas petitions by aliens held at Guantanamo.

Now, first, I have to tell you, I considered your language injudicious when you compared our actions to, and I'm quoting now, "the fundamentally lawless actions of dictatorships." And I wonder why you felt -- obviously you felt strongly about this or you wouldn't have used those words, but why did you feel it necessary to describe what we were proposing in those terms?

KAGAN: Senator Kyl, I don't think we did -- or at the very least we did not mean to compare you to dictators.

The only thing that the letter was meant to say was that we should hold ourselves to very high standards, at least as high or higher than the standards that we would apply to dictatorships, and those were the standards that we were urging Congress to hold itself to in considering this legislation.

And Congress in fact, did. I mean, within a matter of days, Congress came together, 84-15, a remarkable act of bipartisanship, and passed a very good piece of legislation, which did provide Article 3 review of...

KYL: Excuse me...

(CROSSTALK)

KAGAN: ... those military commission determinations.

KYL: There was more to it than that, though. You suggested in the letter that the habeas rights of which with you were speaking should apply beyond Guantanamo to foreign theaters of war.

You wrote, and I'm quoting now, "We cannot imagine a more inappropriate movement to remove scrutiny" -- and the scrutiny means -- is equivalent here to habeas jurisdiction -- "of executive branch treatment of noncitizen detainees. We're all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions and the abuse of prisoners in Guantanamo, Iraq and Afghanistan."

Now, if abuses exist in all three places, the obvious import of your argument was that the reach of habeas should extend to Guantanamo, Iraq and Afghanistan.

KAGAN: Senator, I think that the focus of the letter, as the focus of everybody's attention at that time, was on the Guantanamo detainees. And, as you know, I've, as solicitor general, I've advocated strongly and I made sure that my name appeared as counsel of record on the United States government's Bagram brief, because I believed that the United States has very strong interests in this...

KYL: Here's my question. That is the position you took as solicitor general, dealing with the rights of habeas at Bagram. You expressed a personal opinion before that. This issue could well be presented to the court.

And what I want to know is whether or not it'll be the position you argued on behalf of a client, the United States, or what was personally in your heart and caused to you write with such passion to members of the Senate here.

KAGAN: Well, the letter I do think was focusing on Guantanamo detainees and was focusing on two questions.

KYL: But it wasn't limited and you specifically went out of your way to include also Iraq and Afghanistan in the same clause.

KAGAN: I think we can argue about the letter. The legislation and...

(CROSSTALK)

KYL: So what is your personal view then, that it would not apply to Bagram, just to use a very specific example?

KAGAN: The...

KYL: As you argued in the Michaela (ph) case?

KAGAN: Senator Kyl, I'm solicitor general. The view that I have advocated, and I have advocated it strongly, including by signing my name on a court of appeals brief, which the solicitor general almost never does, is that habeas should not extend to Bagram.

Now, I couldn't comment. I would be recused from that case that I signed my name on. This decision might come to the court. This -- excuse me this question could come to the court.

KYL: But if I can just interrupt, you understand what I'm asking here. If a case similar to that came to the court and you didn't recuse yourself, I don't know whether you'd take the position that you argued on behalf of a client or you'd take the position that was apparently on your heart when you wrote this letter to us.

KAGAN: Well, Senator Kyl, I don't think that that letter expresses a view on the question of habeas rights at Bagram. I think that that letter was focused on the Guantanamo issue. As to...

KYL: Well, then it was gratuitous that you included the phrase, "We are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions and the abuse of prisoners in Guantanamo, Iraq and Afghanistan."

KAGAN: I think that that's just a description of what we were aware of, but the focus of the letter...

(CROSSTALK)

KYL: You also said in the letter, and I'm quoting now, "Unfortunately, the Graham amendment would prohibit..."

LEAHY: I'll give extra time, if need be, but let her answer the question...

(CROSSTALK)

KYL: I'm happy to do that, but we don't have a lot of time and I'm going to pretend like I'm a Supreme Court justice for 14 minutes and you're still the solicitor general, and I will interrupt you if I think we need to move on.

In the letter you said, "Unfortunately, the Graham amendment would prohibit challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment."

It's pretty clear you were saying that habeas should be available to challenge all aspects relating to detainees, including their treatment or conditions of confinement.

Neither the Boumediene case nor the MCA authorized habeas claims to challenge conditions of confinement or treatment.

Do you believe that the treatment of prisoners should be a subject of habeas in these cases?

KAGAN: Senator Kyl, I don't believe that that is a question that has come before the court, and given that...

KYL: It has not. You're right.

KAGAN: And I would not want to suggest how I would decide that question...

(CROSSTALK)

KYL: Well, but you have suggested how you would decide it by saying "Unfortunately, the Graham amendment would prohibit challenges to detention practices, treatment of prisoners," and so on. So you've expressed a personal opinion about that. And why shouldn't I assume that you would bring that personal opinion to the bench?

KAGAN: Senator Kyl, what we expressed in that letter was opposition to the totality of the initial Graham amendment, not the Graham-Kyl-Levin amendment that eventually passed. There were a number of things about that amendment that we thought went too far. I think we were stating the full extent of the amendment's effect. But I don't think that that letter can fairly be read to express a legal view as to each of the particular questions that you're talking about.

KYL: I absolutely disagree with you about that. It dealt with habeas to challenge detention practices, treatment of prisoners, adjudications of their guilt and their punishment. That's what the letter specifically said. I quoted it accurately here.

KAGAN: Senator Kyl...

KYL: Now, we later changed the amendment to only relate to the determination of guilt and punishment. We left out the treatment of prisoners aspects of it because, as you know, that brings in a whole host of huge problems for the courts, and if we were to bring that into -- into our military justice system it would -- it could grind it to a halt.

Go ahead.

KAGAN: Senator Kyl, my view of that letter, or my view of just my current state of mind, is that I have no preexisting views on -- of the way I would approach as a judge the sort of questions that you're asking me about.

KAGAN: Now, you know, I'm perfectly happy to go back to that letter and to try to parse it as carefully as you are parsing it, and to see whether it expressed a point of view, expressed a view as to a particular legal issue that might come before me. And if I think that the letter does express a very particular point of view on a particular issue that might come before me, as in all such cases, I will certainly consider that fact, talk to my colleagues about that fact in determining whether recusal is appropriate.

KYL: I think that's appropriate, and it may offer something else to you. If -- and I invite you to do this. I will probably have a couple of questions for the record anyway. Take a look at the record and if you want to expand in any way on what you have commented on here or make any other point to that, please do that in writing and that way you'll have the full time to think about it and comment on it in whatever way you'd like to.

Let me switch subject here. During the solicitor general hearing -- the hearing for your nomination as S.G., you said in response to a question by Senator Cornyn, quote, "There is no federal constitutional right to same sex marriage." Now, to me, that means the Constitution cannot properly be read to include such a right. Is that what you meant to say?

KAGAN: Senator Kyl, that -- that question was asked me in my role as solicitor general. The question came to me from Senator Cornyn because Senator Cornyn acknowledged and stated what is true, which is that I had opposed and stated opposition to the "don't ask/don't tell" policy. And Senator Cornyn asked me, given that stated opposition, could you perform the role of solicitor general? And particularly, I think, could you in -- in -- with appropriate vigor, defend the constitutionality of DOMA?

And my answer was meant to say, yes, I absolutely could defend vigorously the constitutionality of DOMA; that I understood what the state of the law was and that I understood what my professional responsibilities were. And if that case had come to the Supreme Court this year, I certainly would have been at the podium defending...

(CROSSTALK)

KYL: But with all due respect, DOMA's constitutionality is a different question than your statement, and there were no qualifications on it. You said, "There is no federal constitutional right to same-sex marriage," period. Now, are you qualifying that now? Are you saying that you meant something different by those clear words that you expressed to Senator Cornyn? And I didn't take it out of context.

KAGAN: I was absolutely saying that I understood the state of the law and that I accepted the state of the law.

KYL: So you're only saying, then, that as of right now the court hasn't declared there to be a federal constitutional right. Is that all you're saying?

KAGAN: I am saying that I very much understood, accepted the state of the law and that I was going to perform all my obligations as solicitor general consistent with that understanding and consistent with that acceptance.

KYL: So you wouldn't tell us today, then, whether you believe that the Constitution could be properly read to include such a right?

KAGAN: I don't think that that would be appropriate. As Senator Grassley and I talked about, there is a case that's pending. This -- the case may, or some other case might come before the court and so I couldn't go any further than that.

KYL: So then when you said there is no federal constitutional right to same-sex marriage, what you meant by that was the court has not held that there is a federal constitutional right to same-sex marriage.

KAGAN: The question was could I perform my responsibilities as solicitor general, did I understand the law, did I accept the state of the law. And the answer was yes as to both.

KYL: The -- two Arizona -- I mean, the Arizona case I was talking to you about before our last questioning concluded, the Chamber of Commerce v. Candelaria case, I wanted to ask some more questions. But let me just ask you one case, or one question about that case, and then also another

case called *Lopez Rodriguez v. Holder*. You might remember this was a Ninth Circuit case that applied the exclusionary rule to civil immigration proceedings. And you declined on behalf of the government to ask the court to take that case.

What I wondered is, and I found that rather remarkable since there were -- there was a split in the circuits. The Supreme Court had already spoken on it. There was a significant constitutional issue involved -- obviously a question of significant political importance. And yet you chose not to suggest that the court should take that case, but rather to suggest the court take the Arizona case which didn't involve any of those considerations.

Nonetheless, my question is this: Were either of these cases or your decision to take them influenced by any political considerations? And I say that broadly, meaning, for example, any contact from the White House or officials at the Executive Office of the President or contacts of that sort in either of those two cases?

KAGAN: Senator Kyl, I'm persuaded that we made the correct decision on the law in both of those cases. I don't think that I can talk about internal deliberations of the solicitor general's office, whether with respect to the White House or otherwise.

KYL: So you cannot tell the committee whether or not there was any contact, irrespective of the content of the contact?

KAGAN: Senator Kyl, I -- I don't think it would be right for me to talk about, you know, particular contacts in particular cases, that that counts as sort of internal deliberations. I do think that we made the right decision on the law for the United States' interests in both of those cases.

KYL: I -- I think that there wouldn't be anything wrong with the committee understanding whether or not your decision was based on considerations other than purely legal, especially if it came in the form of requests by the White House or people within the White House because because of the rather political nature of these two cases. I mean, it wouldn't be surprising in a way that there would be a lot of political interest in this. It would be surprising if the solicitor general's office became involved in cases or took positions in cases based upon the political advice or efforts.

You don't think that that wouldn't be an appropriate inquiry for us?

KAGAN: Senator Kyl, the solicitor general's office does, from time to time, and I think that this is true in every administration, have some communications with members of the White House with respect to particular cases. That is not a surprising thing and I think is true in every administration. But I don't think it would be right to talk about internal deliberations in any particular case and I do think that as to both of those cases that you mentioned, the solicitor general's office made the correct decision on the law, on the legal principles that were involved for the United States as a client.

KYL: I'm sure you can defend your position. You do that admirably. But it seems to me that simply noting whether or not there were such contacts would not be an inappropriate thing for you to provide the committee.

Let me ask you one more time about foreign law, because there have been several different iterations of this. Senator Grassley asked you, and I have an exact quotation of what you said in response to that. You said while you were in favor of good ideas coming from wherever you can get them, that judges shouldn't be bound by foreign legal precedents.

Now, that's a -- and then you close by saying "fundamentally we have an American Constitution. Our Constitution is our own."

I have seen that formulation before and I'm troubled by it because it suggests you can turn to foreign law to get good ideas, but that of course you wouldn't be bound by foreign legal precedent. I doubt that anybody who uses foreign law would suggest that they are bound by foreign legal precedent, but it hasn't stopped them from using foreign precedents, legal and otherwise.

And so I'm back to the question of whether you believe that decisions of foreign courts or laws enacted by foreign legislatures should have any bearing on U.S. court interpretation of the U.S. Constitution.

KAGAN: Senator Kyl, I do believe this is an American Constitution, that one interprets it by looking at the text, the structure, our own history and our own precedents, and that foreign law does not have precedential weight. Now, in the same way that a judge can read a law review article and say, "Well, that is an interesting perspective" or "I learned something from it," I think that so, too, a

judge may read a foreign judicial decision and say, "Well, that's an interesting perspective; I learned something from it."

Suppose, you know, we have a Fourth Amendment exclusionary rule. Many countries don't. Suppose that it were...

KYL: Yes, but -- excuse me, but of what relevance is that to the U.S. Constitution? We have many things other countries don't because we have a unique Constitution.

KAGAN: I'm just trying to suggest that it is of the same kind of relevance as it would be if you read a law review article about a similar subject.

KYL: OK, well what you're telling me is, then, that you would look to foreign law. You might relate it to the issues in the case. Would you cite it in an opinion as an interesting idea -- not legally binding, of course -- but supportive of your case, of your position?

KAGAN: I said yesterday, when I talked about the subject, I said it -- that I -- I used as an example a brief that the -- the solicitor general's office had filed on the Foreign Sovereign Immunities Act. When we filed that brief, we talked about some -- what some other countries had done on the Foreign Sovereign Immunities...

KYL: Because you thought it might appeal to some of the members of the court?

KAGAN: Because...

KYL: Well, right or not?

KAGAN: ... the question of -- of -- of how one should look to the Foreign Sovereign Immunities Act and whether officials should be held liable is a question that a number of nations have tried to deal with, and in the same way that one might point to law review articles on the subject, I don't think that foreign opinions should be out of bounds in that way.

But I do think that they do not have any kind of precedential weight, that they are not any kind of ground, independent ground for making a decision about...

(CROSSTALK)

KYL: So I -- I just wondered why you'd take the space then to include them in an opinion.

Let ask you one final question. And, by the way, this is thanks to -- you might have caught George Will's column June 28th in the Washington Post, suggesting some questions for Elena Kagan. I don't know if you saw that or not.

This is one that I didn't tell you I would ask you. I apologize. But I'm just going to quote from -- from one question. He said, "Some persons argue that our nation has a living Constitution. The court has spoken of the evolving standards of decency that mark the progress of a maturing society."

"But Justice Antonin Scalia, speaking against changeability and stressing that the whole anti-evolutionary purpose of the Constitution says its whole purpose is to prevent change, to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a Bill of Rights is skeptical that evolving standards of decency always mark progress and that societies always mature as opposed to rot."

Is he wrong, George Will, and I ask?

KAGAN: I think we have a Constitution, and it's the same Constitution that we've always had, putting aside the Article V amendment process, and that it is meant to endure for the ages.

The Constitution does not change, but it is -- it does -- it is asked to apply and -- and courts must apply it to changing circumstances and to changing conditions. And -- and -- and in the course of that application, there is development in constitutional law. The Constitution itself is fixed, and the Constitution itself is binding.

KYL: Thank you. Mr. Chairman, since I think you've indicated that you would like to conclude the solicitor general's testimony at the end of this round, I'll pose a couple of other questions, including one relating to the reach of the commerce clause, in questions for the record.

And appreciate...

SESSIONS: Mr. Chairman, are you suggesting, Senator Kyl, that I -- I was a few moments late. Was there an agreement that...

KYL: No, no agreement.

SESSIONS: ... we've decided not to have a third round and -- and just finish with this round?

LEAHY: How much longer would you need to ask your...

KYL: Well, I -- I just really have the one other question, but I don't want to take my colleagues' time.

(CROSSTALK)

SESSIONS: OK, I just didn't know...

KYL: I'd be happy to take the time when they're done, Mr. Chairman.

LEAHY: Well, if you want to -- rather than have to have -- rather than have you come back, I -- I did mention earlier before you came in not a specific time, but because things got changed so much because of the situation with, basically, three days of funerals, so if you've got further...

KYL: Let me just throw it out there.

(CROSSTALK)

KYL: Thank you. And I know that...

(CROSSTALK)

KYL: ... at least Senator Coburn and Senator...

SESSIONS: I thank the chairman.

KYL: ... Cornyn have had the same question. In response to some of the other questions, it appears to me that what you were saying about the commerce clause is that, essentially, if there is sufficient commerce, effect on interstate commerce, that it's not the court's job to look behind a congressional act. That's the test. And if that test is satisfied and it's a reliance on the commerce clause, then that's it.

And it seems to me that that's overly broad, because the whole point of the court's role is to interpret what is permitted under the Constitution and that, of course, the court could say precisely what I just articulated as the test. As long as you can show some degree of interstate commerce, then you have a right to legislate in that area.

My question is, though, whether that really would be an abdication of the court of its responsibility to interpret that article of the Constitution -- that part of the Constitution and whether you see any limit on the application of the interstate commerce clause other than a degree of sufficient commerce?

KAGAN: Well, the court has interpreted the commerce clause broadly, not in an unlimited way, but broadly. I -- I agree with you, Senator Kyl, that the court has an important role to play in this, as in any area, in order to -- in order to ensure that government does not overstep its proper authority.

We live in a government of limited and enumerated powers. The government cannot exercise authority beyond -- excuse me, the federal government, Congress, cannot exercise its powers beyond the authority that the Constitution provides.

The commerce clause has been understood to give Congress wide authority in this area, that the general view has been that regulations affecting interstate commerce primarily are the prerogative of Congress and not of the courts, that courts ought to defer.

Defer does not mean abdicate, and there remains an important role to play. The limits that have been set and that exist currently are the limits that appear in the Morrison and the Lopez case, which separates out non-economic activity from economic activity and talks, as well, about areas which are traditionally the prerogative of the states.

Those are the limitations that the court's current doctrine imposes. I treat those limits as precedent going forward and -- and -- and for sure would not think that it's appropriate to abdicate in this area, but do think that deference is generally correct with respect to economic legislation.

KYL: I appreciate your answer.

LEAHY: (OFF-MIKE) I have a quote here. There are other legal issues that come up in which I think it's legitimate to look to foreign law. For example, if a question comes up concerning the interpretation of a treaty that's been entered into by many countries, I don't see anything wrong with seeing the way the treaty has been interpreted in other countries, in other -- look at their foreign law. I wouldn't say that's controlling, but it's something that's useful to look to.

That's what Justice Alito said at his confirmation hearing. I -- I don't recall anybody disagreeing with him. Do you disagree with that?

KAGAN: No, that sounds right.

LEAHY: Thank you.

(UNKNOWN): I don't, either.

LEAHY: Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

I don't think I'll need a third round, but I would ask maybe a little bit of indulgence to go over if we can't get through it all very quickly.

Are you familiar with Plessy v. Ferguson?

KAGAN: Yes, sir.

GRAHAM: I think most people are. It's an 1896 case, and it interpreted the equal protection clause how? What did it say?

KAGAN: It said that separate but equal facilities were consistent with the equal protection clause.

GRAHAM: OK, now that's in 1896. And do you know -- or are you familiar with Justice Henry Billings Brown?

KAGAN: I feel as though I should be, but I'm going to say no.

GRAHAM: Well, you don't want him to be your hero. Trust me.

Here's what he said in 1896. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

Now, that was the majority holding, one of the holdings, and it didn't change until 1954. So to conservatives and liberals alike who believe that precedent can never -- can never change a case, this is a good example of where, I think, we're all glad the case changed.

Because this is what happened in 1954-'55. Justice Warren: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority."

So if you could -- this could be a little bit of a teaching moment -- nothing changed in the Constitution word-wise, did it?

KAGAN: It did not.

GRAHAM: So it's the same words, looked at 50-something years apart, with a different conclusion. How could the court do that and be consistent with strict constructionism?

KAGAN: Well, Senator Graham, I guess a couple of things. The words of the Constitution did not change, but two things did change. The precedents changed, and understandings and circumstances in the world changed.

So the precedents clearly did change. Brown was not a thunderbolt from the blue.

GRAHAM: It was the last in a line of decisions, right?

KAGAN: It was the last in a long line of decisions. And one of Justice Thurgood Marshall's -- his greatest accomplishment was to lead up to Brown, step by step by step, case by case by case. As an advocate, of course, you can have a strategy like that, and he did.

And by the time the court got to Brown, upholding Plessy actually would have been inconsistent with a series of other holdings that it had reached over the years.

And I do think that that sometimes happens in constitutional interpretation. And it also happens -- I mean, we've talked a lot about the doctrine of precedent and about one reason to reverse a decision is when its doctrinal support has been completely eroded. And I think that that is what happened in -- in Brown, that by the time reached Brown...

GRAHAM: And I think most Americans, if not universal, as close to universal as we'll ever get as a nation, glad it happened, in this case.

Now, there's another court decision called Roe v. Wade that's being changed over time, being interpreted differently over time. The court basically held that, before viability, the right to have an abortion was -- of a state to impose limitations on abortion was almost nonexistent. After viability, it was sort of a balancing test.

Is that a general statement of Roe v. Wade over time, there's a difference between viability and post-viability in the eyes of the court?

KAGAN: As I understand the law after Casey, it's that, after viability, the state can regulate as it pleases, except for situations where the woman's life or health interests are at issue. Before viability, the question is whether there is an undue burden on the woman's ability to have an abortion.

GRAHAM: It is fair for the court to consider scientific changes in -- when a fetus becomes viable as medical science evolves?

KAGAN: Senator Graham, I do think that in every area that it is fair to consider scientific changes. We've -- I've -- I've talked in the past about how different forms of technology influence the evolution of the court's Fourth Amendment jurisprudence.

GRAHAM: Well, I'm -- I'm glad to hear you say that, because just as it would have been wrong to not consider the changes of how society had evolved versus segregation of young children based on race, I hope the court would consider the modern concept of viability in the 21st century.

And whatever protection you could give the unborn would be much appreciated on my part by considering science, not your personal feelings, because I think it's appropriate for the court to do so.

Now, let's talk about Harvard. It's a great institution, some place I couldn't have got in, so that makes it, you know, special, because if you'd let me in, it wouldn't be special.

KAGAN: I would have taken you.

GRAHAM: Well, not with my SAT scores. I couldn't even play football at Harvard.

Now, this "don't ask/don't tell" policy you thought to be unwise and unjust. Is that -- you said that, I believe?

KAGAN: I did, Senator Graham.

GRAHAM: And you know what? I think a lot of Americans agree with you. Some do, and some don't. So the fact that you have political opinions different than mine is absolutely OK, and I hope the committee will in the future let that concept work both ways.

I think the problem that Senator Sessions has, it's one thing to have strong feelings. The -- the policy was not set by the military. It was a congressional enactment, which you thought to be unwise and unjust.

Now, I don't doubt your affinity and admiration for the military. You can disagree with the "don't ask/don't tell" policy and still respect the military. I believe that about you and about a lot of other people.

The problem I have is, it was the law of the land. Did other schools at Harvard prevent military recruiters from coming to interview their students or was it just the law school?

KAGAN: Senator Graham, I honestly don't know the answer to that. I don't know what other schools, you know, have employers come and how they do it. And I don't know whether any other schools have particular policies respecting this.

GRAHAM: You don't know if it was -- obviously, it wasn't a campus-wide ban, because the recruiters did meet with law students somewhere else on campus, is that correct?

KAGAN: Senator Graham, the -- the recruiters could have met on campus, as well. The only...

GRAHAM: That's what I'm saying. It wasn't a ban. It was just they couldn't come to the law school.

KAGAN: And could have met -- and could have met -- met on the law school campus. The only restriction that we put on was that the office of career services couldn't provide assistance.

GRAHAM: Which is the place where most students met employers?

KAGAN: No, it's just an office, really. I mean, most -- 95 percent of interviews from employers at Harvard Law School...

GRAHAM: But here's the point. It's clearly not just an office. It was a political statement that you were making, I think -- and maybe I'm wrong -- but it seems to me you were making a political statement. You're not taking the law in your own hands, but you're trying to make a political statement on behalf of the law school that this office is not going to be used by the military because we don't like this policy. Is that a fair statement or not?

KAGAN: Senator Graham, I think what I was trying to do was, on the one hand, to ensure military recruiting, on the other hand, to enforce and to defend the school's very longstanding anti-discrimination policy.

So it wasn't me making a political statement. It was me, as -- as dean of the law school -- and that's what I was -- I had an institutional responsibility -- as dean of the law school, trying to defend an anti-discrimination policy that had existed for, I don't know, 25 years. And it...

GRAHAM: Well, would it apply to the Catholic Church, if they wanted to come and recruit lawyers from the law school, because they don't have women priests?

KAGAN: Well, the way we enforce this policy is, if an employer comes, we give the employer a form, and the form basically says, you know, "I comply with the following policy," and it says, "I will not discriminate on the basis of," and then it says something like race and creed and gender and sexual orientation and actually veteran status, as well. And if the employer signs the form, the employer can get the services of the office of career services. And if not, not.

GRAHAM: OK. So it wasn't a political statement on your behalf at all? You weren't trying to tell the world what Harvard Law School thought about this policy?

KAGAN: It was not, Senator Graham. I was -- I was just trying to defend a very longstanding and...

GRAHAM: It would have been OK with me if it was; I just disagree with you. But I'll take you at your word.

Now, you were an advocate for the -- you were a lawyer who played an advocate role in the Clinton administration regarding formulation of policy. Is that correct?

KAGAN: I was two things in the Clinton administration. I was a lawyer for about half the time, and I was a policy person for about half the time.

GRAHAM: OK. Well, when it came to the partial-birth abortion debate, there's a memo that we have here that talks about, if certain phrases were used by the -- what was the group, ACOG? What was the acronym?

KAGAN: The American College of Obstetricians and Gynecologists.

GRAHAM: As I understand it, they were going to issue a statement that you thought would be a disaster, and you wanted to get the full statement into place. Was that because you were worried that if you didn't get what you wanted in place, the court might seize upon that statement and make a different ruling based on science?

KAGAN: No, sir, it was not. I mean, my -- this was...

GRAHAM: Well, Ms. Kagan, I'm shocked that you say that, because if I believe the way you do, that's exactly what I would have wanted. If I really did believe that partial-birth abortion, as being proposed, was too restrictive -- and I think you honestly believed that, that you wanted to have the broadest definition possible when it came to partial-birth abortion, to allow more cases rather than less -- that I would have been motivated to get the language most favorable to me. And are you saying you weren't motivated to do that?

KAGAN: Senator, I was working for a president who had clear views on this subject.

GRAHAM: But you were trying to take him to an area where he even felt a bit uncomfortable.

GRAHAM: You were advocating, from what I can tell, a broader view of how partial-birth abortion would be interpreted, that when you met with the professional community, the doctors, they informed you early on in a private meeting, according to the record we have, that there'd be very few cases where an abortion would be allowed under the way this thing is written.

And somebody with your background and your view of this issue, to me that seemed disturbing, and you were trying to change that and broaden it. Is that not true?

KAGAN: With respect, Senator, it's not true. I had no agenda with respect to this issue. I was trying...

GRAHAM: Now, wait a minute. Wait a minute.

I certainly have an agenda when it comes to an abortion. I respect the courts, but I'm trying to push the rights of the unborn in a respectful way. You can be pro-choice and be just as patriotic as I am. You can be just as religious as anybody I know.

But that's the point here. It is OK as an advocate to have an agenda. I think Alito and Roberts had an agenda. They were working for a conservative president who was pushing conservative policies.

So it just is a bit disturbing that you, quite frankly, say you don't have an agenda when you should have had. If I'm going to hire you to be my lawyer, I want you to have my agenda. I want it to be my agenda.

KAGAN: I was trying to implement the agenda of the United States president whom I worked for. So I was...

GRAHAM: So did you have a personal belief that partial-birth abortion was, as being proposed, was too strictive (ph) on a woman's right to choose?

KAGAN: I was at all times trying to ensure that President Clinton's views and objectives with respect to this issue were carried forward. And President Clinton had strong views with respect to this issue.

GRAHAM: But here's the difference between being a lawyer and a policy person in a political shop. I would -- I just want to try the best as I can, it's OK if you did. I expect that presidents are going to hire talented, intellectually gifted people who think like they do that will push the envelope when it comes to the law. And the record is replete here, on this issue and others, you were pushing the envelope in terms of the left side of the aisle.

I think the record was replete with Alito and Roberts that they were pushing the envelope on the other side. And that may make you feel uncomfortable. I hope it doesn't. I just believe it to be true. And you don't -- you don't agree with me there.

KAGAN: Senator Graham, the two of us have agreed on many things over the course of this hearing, but...

GRAHAM: We just don't agree on this.

KAGAN: ... but we don't agree on this. What I tried do was to implement the objectives of the president on this issue; at the same time to provide the president with the best legal advice, straight, objective, as I could.

GRAHAM: Fair enough.

KAGAN: And when I became a policy person, to enforce and to ensure that his policy views were carried out.

GRAHAM: I just, quite frankly, am surprised to hear that because if I believed the way you did and I had the opportunity to serve at that level, I'd do everything I could to push the law in my direction in a way that was ethical. And I didn't see anything you did that was unethical.

I did see an effort on your part to push the law in a direction consistent, I think, with the Clinton administration and your political beliefs, which is absolutely fine.

An activist judge is something none of us like -- apparently. Nobody on that side likes it and nobody on our side likes it. Help me find one.

KAGAN: I'm sorry?

GRAHAM: Help me find one. Can you think of anybody in the history of the United States that was an activist judge? Because we don't like these people, we just -- it seems to be an activist judge is somebody that rules the way we don't like. And it's getting to be no more sophisticated than that. I'd like it to be more sophisticated than that.

So what is your definition of an activist judge?

KAGAN: Well, Senator Graham, I think my definition is somebody who doesn't take three principles to heart.

The first principle is deference to the political branches in making the policy decisions of this nation because that's who ought to be making the policy decisions of this nation.

The second principle is respect for precedent, precedent as a doctrine of constraint and humility, and also stability in the law.

And the third principle is deciding cases narrowly, deciding them one at a time, deciding them on narrow grounds, if one can, avoiding constitutional questions, if one can.

GRAHAM: Well, our guys say that Justice Marshall was an activist judge. Do you agree with that?

KAGAN: Senator Graham, I'm not going to characterize any justice as an activist judge, as a restrained judge. I think the best I can do is to set forth the principles that I think are appropriate and to say that, if I'm so lucky, if I'm lucky enough to serve, Justice Kagan would abide by those principles.

GRAHAM: Yes, and I totally understand the dilemma you're in, but we keep using that term. And Justice Marshall will go down in history as one of the icons of the law and one of the greatest justices in the history of the country, even though I disagreed with a lot of his rulings. That's the way it should be. And if our people say that's activism, so be it.

I hope Justice Roberts, which I think is one of the most gifted -- intellectually gift people I've ever met, is being called by my colleagues on the other side for two days now an activist court. And we've got somebody who is wanting to be on the court.

Can you name one person in the United States that you think would be an activist judge, living or dead?

KAGAN: You know, I have a feeling that if I do that, I'm going to end up doing many things that I regret.

(LAUGHTER)

GRAHAM: Well, here's what I regret. I regret all of us throwing these terms around without any definition to it other than we just, you know, we believe the way they judge is just not the right way.

Now, Judge Barak, if this guy's not an activist judge, I don't know who would be. Now, he's an Israeli judge, so maybe we shouldn't talk about Israeli activism because that's foreign activism, but I'm going to go ahead and do it anyway.

KYL: (inaudible)

(LAUGHTER)

GRAHAM: Senator Kyl doesn't mind.

Here's what Judge Barak said. "The judge may give a statute a new meaning, a dynamic meaning that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes because the court has given it a new meaning that suits a new social" -- "that suits new social needs."

What the hell does that mean?

KAGAN: I think it means that the court can change a statute, and I think that that's wrong.

GRAHAM: I think the fact that you don't like what he said makes me feel better about you, because this is so nebulous and so empowering to a judge, it would make an elected official like me feel very worried that the judge doesn't understand the difference between going out and getting elected to office and reviewing policy made by elected officials.

KAGAN: Now we're back to agreeing, Senator Graham.

GRAHAM: And we're going to end it there.

(LAUGHTER)

I wish you well. You have handled yourself well. We have some differences.

I think the hearings have been on the margins better, but not a lot better than they've been in the past. And the -- I wasn't trying to trick you. I think as an advocate in the Clinton administration and other places you have tried to push the law in an ethical way, in a particular way, consistent with your philosophy and your political leanings. And I just want my colleagues to know that is OK with me.

The thing that would not be OK with me, if I thought you were unethical and you did it in a way outside the process that we call the rule of law.

So I wish you well, and I know your family's proud of you and I think you've acquitted yourself very well for the last several days.

KAGAN: Thank you, Senator Graham.

CARDIN: Thank you, Senator Graham.

Let me -- I don't think we need to do this, but let me just go over your 2009 confirmation hearings when you were asked about the partial-birth abortion decision. You repeatedly stated that you would respect *Gonzales v. Carhart*, in which a court rejected a facial challenge to the federal Partial-Birth Abortion Act based on *stare decisis*.

That's what you said at the last hearing. I assume that's your position today.

KAGAN: Absolutely, Senator Carhart (sic), that the *Gonzales* case is settled law, entitled to all the precedent of settled law going forward.

CARDIN: I just really want to make a personal comment, as I did in my opening statement.

Many of us believe *Roe v. Wade* is a matter of privacy and a woman's right of choice and is not really taking sides on abortion, not whether you favor or oppose abortions, whether you favor a woman's choice and the right of privacy and what is the appropriate role for the government to play in those types of decisions.

With Senator Graham still here, I want to just go back to one of the points that Senator Graham raised on enemy combatants and their rights to certain proceedings.

CARDIN: I'm quoting Senator Graham correctly when he said, if we took the war on terror and made it a crime, we'd have a problem for our country.

And I think that sort of misses the point. And as solicitor general, I think the point that the administration was -- was -- was seeking is that there are certain rights in our criminal justice system that defendants are entitled to. They're different under military commissions for enemy combatants, but that we have the right, not the enemy combatant, to determine which venue we can bring about the best justice.

If we think that an action by a criminal -- by an enemy combatant was criminal, we want to use an Article III proceeding and think we can get a better result, why would we want to take away that right? Why would we want to limit our ability to hold a terrorist accountable for their actions, whether it is as an enemy combatant in a -- in a military commission, or whether it's in an Article III court under our criminal code?

Am I -- was that the position that the administration was -- was taking when you were solicitor general or as -- you are still solicitor general?

KAGAN: Senator Cardin, I'm going to say the same thing to you that I hope I said to Senator Graham, which is, this is not a set of policy decisions that the solicitor general's office or that I personally had anything to do with, and I feel uncomfortable discussing that. I think that these are questions that are better addressed to the people who are making policy within the Justice Department on this issue.

CARDIN: And I respect that. I just really wanted to clarify the choice. It's not a choice between giving enemy combatants certain additional rights. It's a question of where we believe we can hold a terrorist more accountable.

GRAHAM: If I could, Senator...

CARDIN: Certainly.

GRAHAM: ... I guess that was a question for her, but I'll answer it, and let's see if you disagree with my answer.

I really have no problem using Article III courts in the war on terror. In many cases, they can be a better venue. I think military commissions can be a good venue to prosecute war crimes, but the hybrid, the third bucket, as we all talk about, are those enemy combatants that the court has deemed to be an enemy combatant, but the evidence, for whatever reason, is not subject to criminal scrutiny, whether it be a military commission trial or an Article III trial or the evidence may be such that you, under the rules of discovery of both proceedings, you couldn't divulge it without hurting national security.

It's in those cases, the 48 that the Obama administration has identified, that the Congress needs to weigh in with the executive branch to understand that the law of war detention is the only valid theory that you can hold someone in that third category.

And when it comes to, quite frankly, the treatment of prisoners, it becomes about us, not them. I love the Geneva Convention as a military lawyer. It is not an individual right, and I want my country to abide by it to the fullest extent possible and win this war within our values.

The one thing I would say in conclusion is that, when it comes to having your day in court as to whether or not you're an enemy combatant, I believe an independent judiciary should look over the military's shoulder, and you have to prove to an independent judge that the military's right, that you are, in fact, an enemy combatant.

But I do not believe our laws should allow enemy prisoners to bring lawsuits against our own soldiers, medical malpractice cases against doctors, or sue prison guards because they don't like the quality of the food. That to me is not consistent with war, and that's what I oppose.

CARDIN: Well, I thank you. We've had this discussion in our committee, and I think, Solicitor General Kagan, you are correct. These are issues that we're going to have to grip with as the legislative branch of government, hopefully working closely with the executive branch.

The bottom line is that those who commit acts of terror against the United States, we need to have an effective way to bring them to justice, whether it's within the military commission or whether it's within our Article III courts, and we should be able to choose the best venue for holding those terrorists accountable.

I know you had an exchange with Senator Feinstein on the interplay between the establishment and free exercise clause. And I want to talk a little bit more about that, because I related to your opening statement when you talked about your grandparents coming to this country, and one reason because of the religious freedom of this nation, which was so dominantly lacking in Europe.

The same reason brought my grandparents to this country. So the -- the freedom of religion is a critical part of this country's tradition.

When we discuss the free exercise and establishment clause with Senator Feinstein, when you did, you said that there is some play in the joints for the government to act to make reasonable accommodations for religion consistent with both the free exercise and establishment clause.

And then you mentioned the Lemon three-part test from 1971, which you correctly noted has not been overturned, but has not always been used by the court, either.

I -- I want to focus on the test used by Justice Kennedy in the court opinion of *Lee v. Weisman*, in which he struck down as unconstitutional school-sponsored prayer at a public school graduation ceremony. And I guess my point -- my question to you is, what special protections should students have under the establishment clause?

KAGAN: Well, what Senator Kennedy focused on, I think I said to Senator Feinstein, that some members of the court have used on certain occasions a coercion test, the question as to whether a particular governmental action coerces a person in his or her religious beliefs.

And the *Lee v. Weisman* case is one that does use that coercion test in -- in a way that provokes strong disagreement, as well, the question about whether that graduation prayer did coerce students in -- in -- in a constitutionally meaningful manner. Senator Kennedy, a majority of the court held that it -- held that it did.

As the court's precedent has come down, it seems a -- a highly fact-specific inquiry. Certainly, the coercion test is used most often when it comes to children. And the -- the court -- you know, the court's cases essentially see a difference between coercion of adults, thinking that adults can kind of stand up for themselves, and coercion of children, where there's a greater fear of the -- the -- the government's impact and coercive impact. And I think that *Lee v. Weisman* reflects that.

But it is a -- a contentious area in the law, with some people -- I think that that case is a good example of the way in which people can look at the -- the same kind of action, and some see coercion and some not.

CARDIN: Thank you very much for that -- that reply. It's very helpful.

With that, I'm going to recognize Senator Cornyn for his inquiries.

CORNYN: Thank you, Mr. Chairman.

General Kagan, let me -- let me start off just a little housekeeping, maybe some cats and dogs along the way, before we get into the main body of what I wanted to talk to you about.

My experience -- and I would be interested if your experience is the same -- that sometimes people who are not members of the legal profession, when they hear lawyers talk or maybe even judges, when they disagree in the context of written opinions, majority, dissenting opinions, sometimes that they read into that a sort of personal animosity or something more than just a disagreement over what the law is or is not.

Have you had a similar experience or observation in your career?

KAGAN: Well, Senator Cornyn, I -- I do think that sometimes people can take a look at opinions, and they're -- they're very strongly worded, and think, "My gosh, these people must just hate each other," and then it turns out that -- not at all, that there are good-faith differences on the law, but that the same people who are sort of taking swipes at each other in -- in opinions see each other as people who are operating in complete good faith and -- and get along with each other in the next case or the case before, and certainly in their lives.

CORNYN: Well, you made -- you made the point better than I did. And -- and it's come to my attention -- actually, there was something published in the newspaper today that suggested that those of us who have tried to draw this line between activist judges who don't feel constrained by a written Constitution and laws or who feel like they have more liberty to basically make things up -- this is my characterization -- and judges who -- who feel bound in a traditional view -- I spoke to this in my opening statement -- there were some folks -- or actually an op-ed that was published today that suggested that those of us who talked about Justice Marshall and -- and talking about his judicial philosophy were somehow disparaging Justice Marshall.

Did you read any disrespect in any of the comments that any of us have made about Justice Marshall? Or did you understand it to be a criticism or a disagreement with his judicial philosophy?

KAGAN: Senator Cornyn, I didn't see the op-ed. I've been trying very hard not to read the papers.

CORNYN: That's smart.

KAGAN: Senator Cornyn, I -- I -- I take everything that has been said here from all the way around the bench as people operating in good faith and certainly I've -- I've gotten nothing but fairness and courteousness from everybody, from every member of the committee, and I take no offense on behalf of myself or on behalf of Justice Marshall or on behalf of anybody else at anything that's been said here.

CORNYN: Thank you. I want to ask you a little bit more. We've talked a lot about constitutional interpretation, and I want to read a statement to you. And this is not a trick question, so if you want me to read it again or go over it more slowly, I will. And I want to get your thoughts on this statement of constitutional interpretation.

And it starts this way. Original understandings are an important source of constitutional meaning, but so, too, are other sources that judges regularly invoke: the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society.

Do you generally agree with that statement or is there any part of it that you disagree with?

KAGAN: You know, I think -- I would -- and I'm trying to think. I mean, I think that what I've said is that you look to text. You look to structure. You look to history, very much including and very especially the original understandings. And you look to precedents.

And in one or another cases, one of those may be more important than others of them. In some cases, you might look to all of them. And that's a kind of pragmatic approach, not an approach that takes a sort of grand overarching philosophical view as to, you know, it's just one thing and it's got to be that one thing in every case. And that's the way I would approach the...

CORNYN: And that's consistent with what you've said as I've heard you testify yesterday and today. And really the part of it that I was interested in was the part -- the last phrase which talked about evolving norms and traditions of our society. What role do you think a judge's opinion of the evolving norms and traditions of our society have in interpreting the written Constitution?

KAGAN: Well, I think that traditions are most often looked to in considering the liberty clause of the 14th Amendment. I think every member of the court thinks that the liberty clause of the 14th Amendment applies to more than physical restraints. And I think almost every member thinks that it gives some substantive protection and not just procedural protections.

And then the question becomes: What substantive protections does it provide? And I think what -- I think the -- the best statement of the approach that the court has used is actually Chief Justice Rehnquist's statement in the Glucksberg case, because he says -- he basically agrees with both of those things, that the due process clause provides substantive protection and means more than restraint from physical restraint.

But then the question is: Well, how -- how do you define that and how do you appropriately limit that because it's for sure the case that the courts should not use that clause to appropriate decisions that best belong to the American people?

CORNYN: Let me ask you another follow-up question. The author of the statement that I read is Goodwin Liu, a professor at the University of California at Berkeley and a pending judicial nominee. But he goes on to conclude, based on that statement of what the appropriate role of interpretation of the Constitution is, he goes on or he has concluded that the 14th Amendment requires the

government to provide citizens with certain social and economic rights, including a high-quality education, expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit.

He also believes or has written that the 14th Amendment guarantees a right to same-sex marriage. He says that evolving norms can change the ambit of the Second Amendment's protection as interpreted by the court. He's also opined that the 14th Amendment requires the nationalization of education by prohibiting the local funding structure that states use to support their education systems.

In applying this interpretation standard, would you -- well, I'm not going to ask you whether you agree with that because that might ask you to decide a case that would come before the court. Correct?

KAGAN: Well...

CORNYN: I was going to ask whether you agree or disagree with some of those stated opinions about what the 14th Amendment means as Professor Liu has articulated.

KAGAN: You -- you said a lot there. And I think that the -- the view that I would have is consistent not with any particular article by Mr. Liu or otherwise, but is consistent with the way that the court has approached these questions. And I particularly think of the *Glucksberg* case which does talk about the way the court looks to traditions, looks to the way traditions can change over time, but makes sure -- makes very clear that the court should operate with real caution in this area; that the court should understand that the liberty clause of the 14th Amendment does not provide clear signposts; should make sure that the court is not interfering inappropriately with the decisions that really ought to belong to the American people.

And so should understand that the clause protects things, but should -- should act in this area with appropriate caution and respect for democracy.

CORNYN: Well, I know you understand sort of the gist of where I'm coming from. The concern is, of course, that if judges, particularly federal judges who serve with lifetime tenure, believe it's within their power to interpret the Constitution based on their subjective notion of what represents evolving norms and traditions, that you very quickly become very separated from and untethered by anything you might call written law or law representing the consent of the governed.

That's the concern, and I'm sure you understand it. I'm not asking whether you agree. I'm just -- I'm suggesting that that's my concern. And you seem to agree that judges ought to act very carefully, and I would suggest my own view is that that is not an appropriate role for a federal judge to render subjective judgments about evolving norms and traditions. That's what Congress is here for, to act responsibly to the needs and the desires and the wishes of the American people, and of course, we stand for election and we can be replaced if people disagree with us, but not judges.

Let me change topics here quickly. And I'm going to -- I have a series of questions here. I tried to frame these in a way that would permit a short answer, and then I'd like to ask you then a larger question. I'll certainly allow you an opportunity to explain and to say anything you like in response.

This has to do with the Solomon amendment that there's been a lot of the discussion about. I told you yesterday that I had concerns about your handling of military recruiters on campus when you were dean of the Harvard Law School. And let me just ask you some questions about that just to sort of establish exactly what happened so everybody can get their brain around it.

You argue that the military had good access to recruit Harvard law students even during the periods before 2002 and from November 2004 through September 2005 when the military was barred from using the services of the Office of Career Services. Correct?

KAGAN: I think that the military had good access during the periods where the Office of Career Services handled it and had good access when the Veterans Association handled the matter.

CORNYN: And when they were barred from the Office of Career Services, you believe they still had good access. That's my question.

KAGAN: Yes, when the Office of Career Services did not provide the assistance, but instead the Veterans Association provided the assistance, and I think that the figures suggest that -- that both before 2002 and in the single recruiting period in 2005 when the Veterans Association handled this, there were just no differences in the numbers. To the extent that there were any differences, they went up in 2005.

CORNYN: Of course, you can't tell and we can't know what they would have been if they still would have had access to the Office of Career Services.

CORNYN: But basically you've -- you've -- you've gone on to answer my second question.

During the time when they were barred from the Office of Career Services, they had access to the Harvard Law School veterans association, and -- which was an alternate channel for military recruiting, correct?

KAGAN: That's correct. Way back before I became dean, my predecessor put in place this accommodation, this way of trying to defend the law school's anti-discrimination policy, but also enabling the military to recruit, and -- and that used the veterans association, and they -- the veterans association in all those years was -- was just great in doing the -- the -- the things that the Office of Career Services otherwise would do.

CORNYN: And as the dean of the law school, you had the power to make an exception to the anti-discrimination policy, if you -- if you chose to do so, correct?

KAGAN: Well, it was a faculty-approved anti-discrimination policy, but I do agree with you, Senator Cornyn, that I would have -- you know, I would have gone to the -- if -- if -- if -- I do agree with you that I had substantial authority over that question.

CORNYN: That's all I'm asking. Conversely, the United States military didn't have any discretion to waive that policy because it was a -- a product of a congressional act. Do you agree with that?

KAGAN: I do, that the military could not sign the discrimination policy that Harvard had because -- because of the statute that was passed by Congress. And that, of course, presented the issue that was involved, is that the military could not sign the school's anti-discrimination policy.

The school and I as dean felt a -- a -- a real imperative to enforce that policy, to defend that policy, but still to ensure that the military had very good access to all of our students so that they could serve in the military, because, you know, that was of critical importance.

CORNYN: And this is, really, the nub of it. The Solomon Amendment, which is what we're talking about, denies federal funds to an educational institution that prohibits or, in effect, prevents military recruiting. Isn't that -- isn't that true? Isn't that generally what the Solomon Amendment does, it denies federal funds to an institution that denies or -- or prohibits or in effect prevents military recruiting on campus?

KAGAN: Yes, it -- it places a condition on federal funding...

CORNYN: Right.

KAGAN: And I -- I forget the exact language, that the Solomon Amendment, but it's -- it's -- it's about military recruiting on campus, but...

CORNYN: Well -- and I think my -- my notes here from your earlier testimony were to the effect that you believe that this alternative, through the veterans center and other locations on campus, provided a, quote, "equally effective substitute," close quote. Is that correct?

KAGAN: This policy, I think, had worked well in the period before I became dean up until 2002. The Department of Defense had found this policy fully acceptable. And it was my understanding that the Department of Defense and -- and -- that -- that that was true, that their view that the policy enabled them good access was right, that the policy did enable them good access.

CORNYN: But your understanding was, at a certain point in time, that if -- if Harvard Law School continued with this policy of denying them access to the Office of Career Services, it would be denied federal funds?

KAGAN: Well, that happened before I became dean, so that happened a year before. In 2002, the Department of Defense said that it had changed its mind, that for many years it had found the Harvard policy acceptable and had thought that it provided full access. In 2002, the Department of Defense came to the school and said that it, in fact, wanted the assistance of the Office of Career Services.

CORNYN: Well, and this is my -- this is my final point on this. If, as you say, that this policy of Harvard Law School in barring the military recruiters from the Office of Career Services had no impact on military recruiting at Harvard Law School, it strikes me that the sole -- sole result and impact was to stigmatize the United States military on the -- on the campus, a service -- the services that you say that you honor.

So explain to me what impact the policy had to -- other than to stigmatize the military.

KAGAN: Senator Cornyn, it -- it certainly was not to stigmatize the military. And every time I talked about this policy and many times besides, I talked about the honor I had for the military, and how much the military meant to our country, and how we -- we -- we all have the freedoms that we have because of the military.

CORNYN: I -- I heard you say that, and I -- I would stipulate that is what you've said all along. But if the policy had no impact on recruiting at Harvard Law School, what possible purpose could it serve other than to stigmatize the military? In effect, you provided a separate but equal means of providing access to students on the campus.

KAGAN: I think -- I think the purpose of the policy was something different. It was certainly not to stigmatize the military. The purpose of the policy was to express support for our students who were being discriminated against, for our gay and lesbian students who wanted to serve in the military.

And the policy was meant to -- to support them or to support with respect to other employers any other students who are being discriminated against and to say, you know, we support those students, and at the same time, at the same time, to ensure that our students who wanted to go into the military had excellent access to military recruiters and vice versa.

CORNYN: Mr. Chairman, I have 50 seconds remaining. I do have just a few more minutes of questions. And I'd be happy to do it on another round after my time or if you'd give me just a couple more minutes of flexibility, I'd be glad to finish.

LEAHY: In lieu of another round -- and we are going to take a break when you finish that -- do you have any problem with us (inaudible) the break and saving an extra round?

KAGAN: I'm sorry?

LEAHY: Do you have any problem of -- we're going to have a break when Senator Cornyn finishes. Do you have any problems going a couple more minutes? And this way he'll...

KAGAN: No, that's -- that's good. That's fine.

LEAHY: And he'll forgo another round.

KAGAN: That's great.

CORNYN: I'll be less than five minutes, if that's all right. OK, thank you.

Let me change -- change topics, Ms. Kagan. And this gets back to questions we've heard about the commerce clause. And, again, this is the -- sort of the jurisdictional hook that Congress finds in legislating in areas that -- that have provided, I think we would all agree, rather expansive federal jurisdiction over much of our -- much of our lives.

And you mentioned yesterday the Lopez and Morrison cases. And, of course, those were a couple of cases that were decided when Chief Justice Rehnquist was -- was -- was chief. By 5-4, the court said that government actions that were defended as legitimate regulations of commerce must deal with commerce as opposed to non-economic matters. I believe you said as much.

Do you agree with the court's decisions in Lopez and Morrison?

KAGAN: Well, Senator Cornyn, I've -- I've refrained from agreeing or disagreeing, but I do believe that Lopez and Morrison are settled law and entitled to the precedential weight that one gives to any decision.

CORNYN: Do you know or do you recall whether you've ever written or spoken in expressing -- previously and having expressed an opinion one way or another about Lopez or Morrison?

KAGAN: You know, Senator Kyl asked me that question. I -- I -- I don't think that I've done any academic work on the subject. I don't know whether I've, you know, spoken about them in any of my many speeches or anything like that.

CORNYN: OK. Well, one -- one document that we -- that was among the many documents we got from the Clinton archives that has been produced, there was a -- a memo you sent to the deputy chief staff at the White House on March the 31st regarding the recently decided Supreme Court case of Seminole Tribe v. Florida, where you noted the, quote, "broad significance," close quote, of the opinion.

In that memo, you said, quote, "The decision, especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools, indicates a serious effort by a bare majority of the court to reorient the balance of power between the federal government and the

states. It's highly unlikely that this case will be the last one to pursue that states' rights agenda," close quote.

Now, this language in your memo is strikingly similar to the opening paragraph of a New York Times article entitled "Lurching Toward States' Rights" that you attached to the memo that I just referred to. The opening paragraph of the article reads, quote, "A head-strong five-justice majority is driving the Supreme Court toward a revolutionary, indeed reactionary, interpretation of federalism, tilting the balance dangerously toward states' rights at the expense of federal power," close quote.

Did -- did you agree then that the article that -- with that article that the Supreme Court's federalism jurisprudence was reactionary and dangerous?

KAGAN: You know, Senator Cornyn, I don't at all remember the article, and I've not seen it. I have seen more recently that memo, which it just sort of think of as the Seminole tribe memo. It's a memo about the Seminole tribe case.

CORNYN: Right.

KAGAN: And I -- I think that I was -- you know, what I did was I described that case. I guess I -- I said in light of -- in light of Lopez, it does suggest that the court is reorienting the federal-state balance in this area, which I think indeed happened in those years.

I think that that was probably, if I -- if I caught that sentence that you wrote, I had referred to Lopez, but this is probably before Morrison. So I think that there were this -- this set of changes that occurred in those years, and that memo was about neither of those. It was about Seminole tribe, which dealt with Congress' ability to abrogate state sovereign immunity under the Commerce Clause.

So -- so that was a few years of -- you know, important developments in the law relating to the federal-state balance.

CORNYN: In fairness to you, what my question is is about the article, not your -- what -- not what you wrote.

KAGAN: And I've -- I've not seen that.

CORNYN: And the article refers to the Supreme Court's federalism jurisprudence as reactionary and dangerous. Do you agree with that characterization, or do you disagree?

KAGAN: Well, Senator Cornyn, I -- I have refrained from saying thumbs up, thumbs down on any cases. I think that...

CORNYN: I'm not asking you that. I'm asking you do you agree with the characterization that the Supreme Court's federalism jurisprudence was reactionary and dangerous?

KAGAN: It actually sounds -- I don't even know what it means to be reactionary and dangerous, but the Morrison case, the Lopez case, the Seminole tribe case our settled law, and I have, you know, no -- I say this -- no plan, no purpose, no agenda, no anything to -- to mess with them.

(LAUGHTER)

CORNYN: That's a -- that's a legal term, I think right?

KAGAN: Mess with them.

CORNYN: I have one last question. I'm sure that's welcome news. Can you name for me any economic activity that the federal government cannot regulate under the Commerce Clause?

KAGAN: Yes, I wouldn't try to, Senator Cornyn. The -- the test that the current court is using is this -- is this test of economic versus non-economic, and that's the test that I would expect to use under settled precedent. And if there are cases in which indeed the claim is presented that economic activity should not fall within Congress' commerce power, those will be cases that I'll decide -- in the appropriate way by reading the briefs and listening to the arguments and talking to my colleagues.

CORNYN: Thank you very much.

KAGAN: Thank you, Senator Cornyn.

LEAHY: Cornyn, does that get you all the time you want? Thank you very much.

Then we will take a recess subject to the call of the chair. Thank you.

(RECESS)

LEAHY: OK, good afternoon. A number in the press have asked about the schedule. Just so you understand, we were having a discussion up here. We'll finish the questions -- and we don't have all that much left -- and then we -- as far as the press go, we will then go to the traditional closed session. And the press won't be able to be there. And (inaudible) one camera. And then that will be it for tonight.

And the public witnesses -- I've talked with Senator Sessions -- we'll begin with those after the rest and repose time in the Senate with Senator Byrd tomorrow. You, of course, can sit with your feet up and watch that part.

KAGAN: I can't come back?

(LAUGHTER)

LEAHY: You know, if you're that much of a glutton for punishment, you're not qualified to be in the Supreme Court.

(LAUGHTER)

But you can -- you can throw kisses to the TV set for those who say nice things, and you can throw stuff at the TV set for those who say bad things.

KAGAN: You know, I think I won't watch.

(LAUGHTER)

LEAHY: You know, that's probably not a bad idea. I'm sure your staff will -- Ms. Davies (ph) will tell you the...

KAGAN: Tell me anything I need to know.

LEAHY: She'll tell you when the -- when the good news comes.

With that, Senator Whitehouse?

WHITEHOUSE: Thank you, Chairman.

Ms. Kagan, I'd like to take up our previous discussion again, which I know you've had a number of folks in between, so where we had left off, I think, we had agreed that it is inappropriate for a judge to bring a particular agenda to the Supreme Court. And I -- just to recapitulate, we do agree on that?

KAGAN: Yes.

WHITEHOUSE: Yes. So if a judge or judges had a particular agenda or motivation, say, to serve the interests and reflect the values of a particular political party, that would be inappropriate?

KAGAN: That would be the worst possible thing.

WHITEHOUSE: And since it would be inappropriate, the worst possible thing, is it likely that such a judge would disclose that agenda or motivation, would make it a part of a written opinion, would admit it?

KAGAN: Senator Whitehouse, as -- as you asked the question, that seems unlikely.

WHITEHOUSE: Doesn't it?

KAGAN: Yes.

WHITEHOUSE: So if you had such a judge or judges on a court and they would not disclose such an agenda or motivation because it is so inappropriate, you would have to look for a pattern of decisions to determine whether such an agenda or motivation were being pursued, would you not?

KAGAN: Senator Whitehouse, I -- I -- I guess I don't want to make any comment about how one should -- how one should discover a judge with an agenda.

WHITEHOUSE: But certainly, that would be the only way, since it would never be in the decision itself, as a matter of the textual content of the decision, because that would be so inappropriate.

KAGAN: Senator Whitehouse, I -- I -- I think I can only say what I -- I just said.

WHITEHOUSE: Well, I wonder if there might be -- we've discussed a few other things that might be similar tell-tales, if judges were seeking to impose a particular point of view or to reflect a particular point of view.

Those tell-tales, one might be a tendency to 5-4 decisions, which would be a logical clue, since a broader consensus of judges, as we discussed, would make it difficult to move more aggressively. If your intention is to move more aggressively, you're more likely to deliver a lot of 5-4 decisions. That would be another tell-tale that we discussed.

Another tell-tale might be findings of fact by a Supreme Court that are essential to a particular decision, even though an appellate court is not supposed to make such findings of fact.

Another tell-tale would be advancing a theory of precedent that allows judges to selectively undermine and topple precedent -- again, selectively -- by hotly contesting it.

Are there any tell-tales that you can think of that would suggest the presence of a particular agenda or motivation on the part of judges beyond those?

KAGAN: Senator Whitehouse, I have to be honest with you and say that I'm more focused on -- right now on what I would do as a justice, if I'm fortunate enough to be concerned, than -- than any ways of discovering what any other judge might do that's -- that's inappropriate.

As -- as I suggested to you before, I assume the good faith of everybody on the court, and I think that's the way I will approach the -- the job and the institution.

WHITEHOUSE: And in your position, I think that's the correct answer and the right thing to both say and do. But for those of us who have been witness here to lengthy discussions about the importance of precedent and the danger of judicial activism and who have seen you challenged as to whether you'll be able to be a neutral and dispassionate judge, one without a motivating agenda.

It is a matter of interest to take a look at what appear to be the clear tell-tales that would be left by judges with that motivation or agenda, and see how often they actually appear in the recent behavior of the court, particularly the five Republican appointees who've steered it so hard to the right.

Of the tell-tales that we've talked about, a pattern of decisions going a certain way, a tendency towards 5 to 4 decisions, an improbable and unusual finding of fact by an appellate court in a major case, and an announced theory of precedent removal by hot contest by the judge, we seem to be batting -- what is that? -- 5 for 5.

And I say that not to seek a response from you at this point, because I think you've given a complete and adequate response as a nominee to the court to say that it's not your intention going into that court to begin by trying to assess whether there are judges on that court who have motivations to pursue a particular ideology.

But I think for those of us who have to protect and safeguard the institution, it's also important for us to look back and see how we did and what we can learn from other previous nomination hearings where we were given very, very straightforward assurances about the importance of precedents and how nothing but balls and strikes would be called and how clearly we were going to be very careful, modest, precedent-respecting judges.

And then we saw this. Every available tell-tale that would ring if judges were pursuing a particular agenda or strategy other than to say it right out in the decision itself, which we've agreed is something that no judge would do because it would be so inappropriate. I think you said the worst possible thing. Every other potential bell that we can think of is ringing.

And so that's why I mention it because I do think it is a matter of general concern. Although I don't dispute your answer to my questions. I think you're in exactly the right place where you should be on that point.

KAGAN: Well, Senator Whitehouse, I think it's not a matter of being in the right place. I think I'm saying what I think, which is that I respect the court as a whole enormously as an institution and each of the members on it. And that respect has grown every day in the year that I've been solicitor general.

WHITEHOUSE: Well, I respect the court as an institution, too, and I think it's vitally important because it does not have the power of the purse or of executive administration, because it stands on the confidence of the public that when all these tell-tales are in place, it is a cause for some concern, at least for some of us.

So again, I appreciate the time we've had. I wish you well. And I thank you again for the candid and complete nature of the way in which you are responding to questions here today. And I think the window onto Elena Kagan that America is getting in these hearings is one of a very bright, very good-humored, very well-intentioned and very able future Supreme Court justice. So I thank you.

KAGAN: Thank you.

WHITEHOUSE: Mr. Chairman?

LEAHY: Thank you very much, Senator Whitehouse.

Senator Coburn?

COBURN: Thank you.

Well, here we go. I was just wondering, yesterday you asked a question about -- you were asked a question about whether you wrote a letter of recommendation for Miguel Estrada and you said you did not because he didn't ask you to. Did anybody -- either you or anybody on your behalf ask him to write the letter of recommendation for you?

KAGAN: I don't know, Senator Coburn.

COBURN: Good question. Do you believe he should have been confirmed?

KAGAN: I -- I said that he is a great lawyer and a great human being, and I think I was asked whether he...

COBURN: I'm asking you whether or not you believe he should have been confirmed.

KAGAN: I wasn't trying to avoid your question. I think he'd be a great judge.

COBURN: So your answer is yes?

KAGAN: Yes.

COBURN: And if you were sitting up here, you would have voted for him. Is that correct?

KAGAN: I would have.

COBURN: Thank you. Moving on...

KAGAN: I hope I would have anyway. You know, who knows what it feels like to be one of you guys and to -- to be subject to all the things that you guys are subject to.

COBURN: I want to give you a big secret. It's not all that much fun.

(LAUGHTER)

I have to reply to my colleague from Rhode Island. I gave a speech two or three weeks ago on the Senate floor talking about hearings. We didn't always have hearings. They're a relatively new phenomenon in the history of our country. You know, we had two areas of very distinct testimony about Judge Sotomayor, which she has demonstrated she did not live up to in the two most recent cases of the Supreme Court.

So, you know, the question really comes is confidence in our country today. We have problems with confidence in our economy, confidence in our government, confidence in Congress. And I was wondering, Judge Kagan, is it important to you that the Supreme Court is seen in a light of confidence by the American people -- not us, but by the American people?

KAGAN: Senator Coburn, it's an interesting question because, of course, you want everybody -- every -- you want every -- you want the nation's citizenry to have confidence in each institution of government. But on the other hand, I think it would be wrong for a court to decide an individual case by asking itself...

COBURN: Well, I'm not -- I'm not implying that. I'm not saying you make a decision based on whether you're going to have confidence. I'm saying, in general, is it important to you, if you are a justice, that the American people have confidence in the institution of the Supreme Court?

KAGAN: I think that the welfare of the country is certainly best served if the American people have confidence in the Supreme Court, as is true of the other branches of government as well.

COBURN: Right, right. Do you have any empathy with those of us that feel there's a low confidence right now in the institutions of government?

KAGAN: Senator Coburn, I -- I think it would be better for the country if people had greater confidence than they do in all of the institutions of government. And that's -- that's not to say, you know -- it's hard to know how these things work out over time. And -- but, you know, it's -- the country is well served when people have confidence in the institutions that lead them.

COBURN: And -- and would you agree with me that the glue that really binds us together is the glue that we, in fact, embrace the rule of law, that there's blind justice, and that's our goal? We're not perfect in it, but that's our goal at every point, at every opening, is that we can make that available as best we can at every opportunity. That's a glue that binds us together, is it not?

KAGAN: I believe that thoroughly. When I gave my opening statement, I said that the blessings of liberty, which is the phrase that our Constitution uses, the blessings of liberty are rooted in the rule of law.

COBURN: Yes, well, I wonder if you've ever thought of it as I have. I'm 12 or 13 years older than you. But one of the things that I...

(CROSSTALK)

KAGAN: Maybe not after this hearing.

(LAUGHTER)

COBURN: No, I'm sure I'm older. Actually, you're doing quite well. Have you ever contemplated the idea of what your freedom was like 30 years ago and what it is today?

KAGAN: How old was I 30 years ago?

COBURN: You were 20.

KAGAN: I'm not sure I have ever contemplated that exactly.

COBURN: Well, I want to tell you a lot of Americans have, and I certainly have. There's a marked change in this country from when I was 20 and now that I'm 62. And one of the problems with confidence, and the reason I asked you the question, is a lot of Americans are losing confidence because they're losing freedom. They're losing liberty.

Do you recall I asked you about the vegetable question yesterday. That's on the front of a lot of people's minds, not vegetables, health care. You know where I was going. The very fact that the government is going to have the ability to take away, mandate what I must buy or must not buy -- a very large loss of freedom.

COBURN: And so my basic question comes back to you is, is that important, that the -- the fact that confidence in all government institutions is at an all-time low in this country? And should we be concerned about it? And should we be trying to right the ship so that we restore that confidence?

And I'm not talking in specific rulings. But you would agree that we ought to be trying to build that confidence and to reassure the American public that we actually get it, that we understand the Constitution is the founding document.

You've testified many times. I have some problems with some of what you said, but that's the bedrock instrument under which we have.

But with a perceived loss of liberty, confidence is declining. And then on top of that, as we discussed yesterday, the commerce clause and this very expansive view of it as held by the Supreme Court, which is counter to what our founders wrote, there's nobody that -- it started in 1937. It's counter to what our founders wrote. And as it has expanded, liberty has declined. And we've seen that rapidly increase.

And it's not just Republican or Democratic institutions -- administrations -- that have overseen that. They've both been guilty.

So I just wanted to -- whether you'd ever contemplated that. Because I think that can give you some insight into what America is concerned about.

I don't think judges just go to the bench and look at the Constitution. I think they have to look at the fact of how do we continue this wonderful and grand experiment and that there are consequences to their actions, whether it be the consequences of the senator from Rhode Island seeing a conspiracy and sinister, and people who think about and believe in the original intent, believe in expanded freedom, not limiting freedom, and believe that what the founders had to say in the Federalist Papers and interpreting the Constitution was of any import.

So you've never contemplated any change in the freedom that you've experienced?

KAGAN: Senator, I guess I'll say this to what you said, which is that I believe that confidence in our institutions is terribly important. The confidence in the Supreme Court is terribly important.

I do think that the job of a Supreme Court justice is to decide cases. And -- and in deciding cases, it's not to think about big questions like restoring American confidence, that that's more a question and -- that belongs to the members of -- of -- of this body.

I do think that the job of a Supreme Court justice is to listen very carefully to all arguments that are presented. And that means all arguments. And that's what I've pledged to do and that's what I will do if I'm...

COBURN: You said earlier to Senator Klobuchar this morning that people get to make fundamental decisions about this country. You know what? A large percentage of people in America today don't believe that. They don't believe they're getting to make decisions about this country.

I mean, that is a serious problem when 22 percent of the people in this country have confidence in Congress. And that's just speaking about Congress. I haven't seen a poll on the Supreme Court.

So the question -- that's the ideal, is we do want the people to be able to make the decisions. The fact is, is they're not today. There's a disconnect.

And it's seen -- that's why we see the unrest, the tension that's out there in the electorate, is that we're not paying attention. And that's why I was so hard and insistent on original intent, because they're like me, they're not lawyers. They read the Constitution and they see the words and they're not sophisticated. They didn't go -- most didn't go to Harvard. And they say, you know, here's the fact and here's the statement, and the fact doesn't match the statement.

And I'm just saying when it -- when it's a sliver dividing line one way or the other, if the Supreme Court isn't paying attention to that on an individual case when it can go either way, it ought to go for freedom, not more government, not bigger government, not an expanded commerce clause. It ought to go for individual freedom, individual liberty, when it's on the narrow.

I'm not talking about major cases that you can easily see plainly, because you're going to have a lot of cases that are going to be tough for you to decide. You would agree with that, correct? It's going to be difficult.

KAGAN: Senator Coburn, I think that there are difficult cases that come to the court, no question.

COBURN: The other thing that you said to Senator Kaufman this morning, you were quoting Holmes again on the commerce clause, is that the judges aren't principal players in that game. That was one of your quotes back to him.

And I just have to relate to you again my concern as I read the Constitution and I read what the founders wrote about the commerce clause -- I mean, they even said we were going to try to expand it and we were going to -- I mean, they actually quoted that we would try to abuse what they meant and they said that's not what we meant. And yet we still have this tremendous expansion of the federal government, and with it, a concomitant loss of individual freedom.

And so I have to tell you, my hair has grayed a little bit the last two days because of your position or lack of emphasis on original intent. I think it's valuable.

I have one other question in regard to the same thing. Senator Grassley quoted to you out of President Obama's book about property rights. And you gave an appropriate, good answer.

The question I would have to you is one of the concerns that Americans have today. I talked about, I think, our rule of law is what binds us together. No matter where you come from, what your wealth status is, the fact is in this country like no other you have a better shot at getting to the court of law and a fair outcome than anywhere in the world.

But some of the things we're doing, which the Supreme Court should weigh in on -- and he talked about property rights, including abrogation of contract rights to bond holders in a government-managed takeover of an auto company. I mean, it's a total violation of contract law that bond holders don't have a right. When they should be first, they're placed last.

When we ignore the idea that the problem with illegal immigration isn't illegal immigration, it's the very fact that somebody is violating a law, and then with amnesty towards that it's seen as tearing apart the glue that holds us together. Or the proposed recommendation of cram down on mortgages where Congress would pass a bill that said mortgage contract's out and we're going to tell you what your contract is.

Do you see my concern on property rights in that regard and also the fact that we're kind of abandoning contract law as well as tort law? And this is Congress. I'm not talking about the court.

KAGAN: Senator Coburn, I think when you say it's Congress, I think that's right, that some of the things you just talked about are policy issues that are appropriately addressed, debated, argued about by Congress. That, of course, decisions get to the court in a different way. They get to the court in the form of individual cases and controversies.

And the only way that a judge can legitimately approach and decide issues is through that forum by looking at, you know, the actual circumstances of a case, the actual facts, the record, and trying to apply the -- the law as best one can.

So it might be that some of these bigger issues that take place in Congress about the appropriate direction of the country, you know, in some way inform or are seen in individual cases or controversies, but that's the only way that the court can look at them, not as these big abstract questions, but just...

COBURN: I'm not asking you to do that. I'm just trying to get a feel for your appreciation of where we are today in this country.

Some of my colleagues may disagree, but I'm traveling all over this country today and I see something I've never seen in my 62 years of life: an absolute fear that we're losing it, that our institutions are failing us, that we're ignoring the basic document that combines us and puts us together, and that with the abandonment of that, we're liable to lose a whole lot more than just our short-term gains and income.

And it's a real problem. And it's what -- you know, the fact is, is today our kids' future has been mortgaged, and the confidence that we can get out of that is waning, and that we need to build that back up.

So, you know, it's just a plea for you to look at as you become a justice, if you do, that it's not just a -- the Constitution, it's what was the Constitution intended to be.

COBURN: It's my appeal for you to go back and look at the Federalist Papers and what are -- I -- I thought they had tremendous wisdom.

They weren't -- they didn't get it all right, but they sure got a lot of it right, and the proofs in the pudding of where we are today. Let me move.

KAGAN: Senator Coburn, I -- I said in my opening statement that I was only going to make a single pledge, and that was the pledge that I made in my opening statement, but I'll meet you another. I'll re-read the Federalist Papers.

COBURN: Thank you. I'd appreciate that.

KAGAN: It's a great document.

COBURN: America will appreciate that.

I want to go to you to the Second -- Second Amendment for a minute, if I can. One of the things that we found in -- in some of the papers as we looked, and you know we've looked at thousands of them, and there's no way you're going to be able to recall all of them, although I'm sure you looked at some of them.

You -- you chose a phrase when talking about the Second Amendment that you were not sympathetic when discussing someone's claim that D.C.'s handgun ban violated their fundamental, pre-existing right to bear arms. And I have a very specific question for you. Do you believe it is a fundamental, pre-existing right to have an arm to defend yourself?

KAGAN: Senator Coburn, I very much appreciate how deeply important the right to bear arms is to millions and millions of Americans. And I accept Heller, which made clear that the Second Amendment conferred that right upon individuals, and not simply collectively.

COBURN: I'm not asking you about your judicial. I'm asking you, Elena Kagan, do you personally believe there is a fundamental right in this area? Do you agree with Blackstone that the natural right of resistance and self-preservation, the right of having and using arms for self-preservation and defense? He didn't -- he didn't say that was a constitutional right. He said that's a natural right. And what I'm asking you is do -- do you agree with that?

KAGAN: Senator Coburn, to be honest with you, I -- I don't have a view of what are natural rights independent of the Constitution, and my job as a justice will be to enforce and defend the Constitution and other laws of the United States.

COBURN: So -- so you wouldn't embrace what the Declaration of Independence says, that we have certain God-given, inalienable rights that aren't given in the Constitution, that they're ours, ours alone, and that the government doesn't give those to us?

KAGAN: Senator Coburn, I believe that the Constitution is an extraordinary document, and I'm not saying I do not believe that there are rights pre-existing the Constitution and the laws, but my job as a justice is to enforce the Constitution and the laws.

COBURN: Well, I understand that. Well, I'm not talking about as a justice. I'm talking about Elena Kagan. What do you believe? Are there inalienable rights for us? Do you believe that?

KAGAN: Senator Coburn, I -- I think that the question of what I believe as to what people's rights are outside the Constitution and the laws, that you should not want me to act in any way on the basis of such a belief, if I had one or...

COBURN: I -- I would want you to always act on the basis of a belief of what our Declaration of Independence says.

KAGAN: I -- I think you should want me to act on the basis of law, and -- and that is what I have upheld to do, if I'm fortunate enough to be concerned -- to be confirmed, is to act on the basis of law, which is the Constitutions and the statutes of the United States.

COBURN: Going back to the Second Amendment, what we know with the two most recent cases is that they didn't necessarily take away the precedent in the Miller, does it?

KAGAN: I'm sorry?

COBURN: They don't necessarily take away the precedent of Miller.

KAGAN: As -- as I've not read McDonald yet, because of these hearings, but if I understand Heller correctly, Heller -- Heller did not find it necessary to reverse Miller.

COBURN: Right.

KAGAN: Heller distinguished Miller, involving a different kind of weapon.

COBURN: So -- but when you say...

LEAHY: The senator's time has expired.

COBURN: We are going to have another round?

LEAHY: Others have asked for it. I...

COBURN: I've got several more questions, Mr. Chairman.

LEAHY: Then we'll give -- well, with all due respect to the senator, if they're questions, fine. If they're 10, 15-minute speeches, your personal beliefs, which I know you hold strongly, are fine, but I'd prefer questions. I will be willing to give you another five minutes when your turn comes back.

Senator Klobuchar?

KLOBUCHAR: All right. Thank you very much, Mr. Chairman.

Hello again. I wanted to read you a quote. I was thinking as I was listening to Senator Graham ask you about your role when you worked for the Clinton administration and you were answering about how your role was a specific one and that it was different than you trumpeting your own personal beliefs. And this was a quote from another nominee at another one of these hearings.

And this person said, "My view in preparing all the memoranda that people have been talking about was as a staff lawyer. I was promoting the views of the people for whom I worked. In some instances those were consistent with my personal views. In other instances they may not be. In most instances no one cared terribly much what my personal views were. They were to advance the use of the administration for which I worked."

Do think that's a fair characterization of some of the work that you were doing when you were working for others in the administration?

KAGAN: I think that that is a fair characterization, Senator Klobuchar. And I think that most White House assistants would -- would sense the truth of that statement.

KLOBUCHAR: And that was actually John Roberts at his confirmation hearing in response to some of the questions from my colleagues.

I was really interested in listening to Senator Coburn -- I wasn't going to focus on this as much -- when he was talking about the concept of freedom, which is integral to our country and to our Constitution. And he was actually asking you just now back 30 years ago if you thought that we were freer. And I think it's a very hard question to answer, and not one that necessarily is one that you would expect in this hearing.

But I was thinking back 30 years ago was 1980, and in 1980 -- I just checked -- the top songs were Blondie, "Call Me"; Queen, "Another One Bites the Dust." I remember I was just starting to wear little bowties and things like that. And then I was thinking about were we really freer, if you were a woman in 1980.

Do you know, Solicitor General, how many women were on the U.S. Supreme Court in 1980?

KAGAN: Well, I -- I guess zero.

KLOBUCHAR: That would be correct. There were no women on the Supreme Court. Do you know how many women were sitting up here 30 years ago in 1980?

KAGAN: It was very striking when Senator Feinstein said that she was one of two women. I thought, how amazing, how -- so how many?

KLOBUCHAR: There were no women on the Judiciary Committee -- in fact, no women were on the Judiciary Committee until after the Anita Hill hearings in 1991.

Do you know how many women were in the United States Senate in 1980, 30 years ago?

KAGAN: I'm stumped again.

KLOBUCHAR: No women were in the United States Senate. There had been women in the Senate before, and then in 1981 Senator Kasselbaum joined the Senate.

So as I think about that question about if people were more free in 1980, I think it's all in the eyes of the beholder. Certainly, people have the potential freedom to get these jobs, but there were things that were impeding them from advancing to her I think that they wanted to go.

And you actually gave a speech in 2005 on women in the legal profession, a status report. And that's I mentioned in my opening remarks, it's clear that we have come a long way.

And as you noted, when Harvard's president -- in his speech you noted that Harvard's president was asked about the law school and how it was faring during World War II when so many of the people who would have been in the law school were off to war, and his response was that it wasn't as bad as he expected. He said, "We have 75 student, and we haven't had to admit any women."

But your speech also made some very serious points about the way there are still gender disparities in the legal professions. We all know that more and more women are -- are graduating from law school and from our professional schools, but women lawyers, to quote you, "Women lawyers are not assuming leadership roles in proportion to their numbers." And as you note, that is, quote, "troubling not only for the women whose aspirations are being frustrated, but also for the society that is losing their talents."

As dean, you clearly recognized the problems and disparities faced by women entering the legal profession. What should you do about it? And what else do you think we should be doing about it?

KAGAN: Well, there still are these disparities, and it's -- it's interesting, because right now, you know, Harvard and all schools are about 50 percent women, you know. Sometimes it's 48 and sometimes it's 52. Some schools are actually a good deal more -- 55...

KLOBUCHAR: Well, and we know there's over 50 percent of the people in this country are women, but there's only 17 out of 107 senators that are women. Go on.

KAGAN: ... not just in -- in -- in these governmental institutions, but, you know, in -- certainly in law firms, women don't have the kind of -- there's just not the kind of diversity that I think anybody would want.

And -- and I think people are -- are trying hard to make that diversity happen. I don't think it's a matter of -- of -- of bad faith in this regard. But -- but I do think that there are structural obstacles, that there are ways in which it's -- it's hard to balance work and family, still harder for a woman than it is for a man, and that that often comes into play in the legal profession, as it does elsewhere.

And if you -- if you look at these opportunities for women, you know, I think probably the best thing that we could do as a society -- but this isn't the court's role, this really is Congress's role -- is to -- to try to enable women and men, but I think that they especially strike women, to -- to manage those balances, the -- the -- the desire to have a fulfilling professional life and also the desire to have a wonderful family life, to manage that balance better, and to sort of create the structures that enable them to do so.

And, you know, the -- the work that I did in the Clinton White House, you're quite right, it had -- it has nothing to do with what I would do as a judge, and it also didn't have much to do with my particular beliefs, except that I did believe in -- I mean, I was proud to serve in the administration of President Clinton.

And -- and one of the things that I did do there was to work on some of these issues, to work on -- on issues relating to childcare, for example, and to -- to -- to try to help women and men with these very difficult issues in -- in -- in how to have wonderful professional lives and also have wonderful family lives.

KLOBUCHAR: So do you think women are more free -- just to end this discussion that was sparked by Senator Coburn, go back to 1980 -- do you think women are more free to pursue some of their career goals now than they were in 1980, given the numbers that we see?

KAGAN: I think that there's no question that -- that women have greater opportunities now, although they could be made greater still.

KLOBUCHAR: Thank you.

One last point I just wanted to make. There still continues to be a lot of focus on the recruiting, military recruiting. I think you made very clear that at no time were the recruiters banned from the Harvard campus and that, in fact, I think you've mentioned -- I don't want to put words in your mouth -- but the military recruiting, the numbers went up. More people were recruited during the time you were there. Is that right?

KAGAN: You know, I don't want to make too much of this. The numbers were, you know, basically stable. There was certainly no drop in the -- in the particular year in question. There was actually a slight uptick.

But it -- it -- it seems to me that if you look over the whole history, both before I was dean and after I was dean, what it suggests is that the difference between military recruitment being done under the kind of auspices of the Office of Career Services and being under done the auspices of the veterans organization just didn't make a difference.

KLOBUCHAR: OK.

And I just, you know -- numbers are always interesting and important, but for me, sometimes what people say that would work with someone like you is important. And I know that the chairman put this letter in from student Robert Merrill, who had served in Iraq. In his own words, he went from fighting in the streets of Fallujah to studying in the hallowed halls of Harvard Law School.

And he talked about in this -- in this op-ed that was in the Washington Post, he talked about how the students pretty much treated him the same as other students, except for a few silly questions, how most of the faculty members were fine, but didn't really acknowledge what had happened, but you had acknowledged his service.

And he ended by saying this. He says, "She was decidedly against 'don't ask/don't tell,' but that never affected her treatment of those who had served." He says, "I am confident she is looking forward to the upcoming confirmation hearings as an opportunity to engage in some intellectual sparring with members of Congress."

He says, "She treated the veterans at Harvard like VIPs, and she was a fervent advocate of our veterans association." And then he says, when he talks about the sparring with members of Congress -- and I'll end with this -- he says, "I would especially warn the members of Congress to do their homework, as she has a reputation for annihilating the unprepared."

(LAUGHTER)

I think that's a good ending. You've done a wonderful job. Thank you very much.

KAGAN: Thank you, Senator Klobuchar.

LEAHY: Thank you very much.

Senator Sessions, did you want more time?

SESSIONS: Yes...

(CROSSTALK)

LEAHY: I know Senator -- Senator Coburn has said he wants more time. Oh, I'm sorry. Senator Franken hasn't had his -- I'm sorry. We'll go to Senator Franken. Let's just see how many more -- want more time. Senator Coburn has already said he wants another five minutes. You want how many -- how much more time? You want more time?

Senator Hatch? May -- Senator Grassley, you want another five minutes? Senator Cornyn? OK. Senator Franken, let's -- let's get going, because we have the secure room available at 5 o'clock to do the closed -- to do the closed session.

Senator Franken?

FRANKEN: Thank you, Mr. Chairman, General Kagan.

I'm extremely concerned about the proposed merger between Comcast and NBC Universal. Media consolidation matters in a really fundamental way. I watch television for entertainment, but I also get a lot of my information there, too. So when the same company owns the programming and runs the pipes that bring us the programming, I think we have a problem.

I'm interested in the ways that the Supreme Court affects the information that you and I get when we turn on the TV or read the newspaper. Sixty years ago, in the United States, the Associated Press, the Supreme Court found that the First Amendment supported aggressive antitrust enforcement.

Justice Black wrote -- this is a quote -- "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." He then continued, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

When I read Black's opinion, I think immediately of Comcast and NBC Universal. Comcast is already extremely powerful. It's the nation's largest cable operator and also the largest home Internet service provider. If it owned both the pipes and the programming, it would have the ultimate ability to keep others from publishing. They could just choose to favor its own programming over

programming that other companies produce and withhold its own programming or charge more for it and drive up Minnesotans' cable bills.

To make matters worse to me, if Comcast and NBC merge, I worry that AT&T and Verizon are going to decide that, well, they have to buy ABC or CBS to compete, and that will mean there will be less independent programming, fewer voices, and a smaller marketplace of ideas. That's -- that's a First Amendment problem. It's also an antitrust problem.

So, General Kagan, here's my first question: Do you agree with Justice Black that freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not?

KAGAN: Well, Senator Franken, I -- I -- first off, let me say that I think that that Comcast merger is under review by the Department of Justice at the current moment. And so that I want to steer well clear of...

FRANKEN: I'm not asking you about it specifically.

KAGAN: Yes, I mean, the -- the -- you know, the -- the -- the First Amendment does not provide a general defense, I think, to the antitrust laws. I'm not saying that in any particular case First Amendment principles might not be relevant, but in general, the antitrust laws are the antitrust laws, and they apply to all companies.

FRANKEN: OK. Let me talk about online.

KAGAN: Talk about...

FRANKEN: Speech that's online, over the Internet and over the airwaves or over cable.

FRANKEN: Many of the pipes that carry speech are in the hands of corporations. Whether those corporations are cable companies or Internet service providers. And I brought this up with then-Judge Sotomayor at last year's hearing. I asked her about net neutrality.

And she agreed that there is a First Amendment interest in ensuring that the Internet stays open and accessible, protected from corporate interference. I'd like to ask you a variation on that question, now applying it to the merger context. Let me start with a pretty simple question.

Do you believe that the First Amendment helps to promote diverse public voices and opinions?

KAGAN: One of the purposes of the First Amendment is to ensure a public sphere in which all kinds of different opinions and views and thoughts can be expressed and we can learn from all of them.

FRANKEN: And would you agree that the First Amendment governs actions or behavior by the federal government?

KAGAN: Of course, the First Amendment governs actions and behaviors by the federal government as well as by the states.

FRANKEN: OK. So the First Amendment helps to promote diverse speech and it governs governmental action. In a merger case, the government is the one making the decision to allow two companies to merge. Given all of this, do you believe that the First Amendment could inform how the government looks at media antitrust cases?

KAGAN: Senator Franken, I guess you could be thinking about that as a kind of policy matter as to whether the authorities that are responsible for approving mergers and such ought to take into account so-called, you know, First Amendment values. Not the -- and I think I would defer to people who know a lot more about antitrust policy than I do on that. So that -- I guess that's what I'd say.

FRANKEN: OK. Thank you.

One last. A lot of people have been talking about judicial acumen. I know that I certainly have. And I'm glad my friend Senator Graham brought this up. He said, can you find a judicial activist somewhere? And I can understand why you didn't want to find one. I want to try to help.

I want to -- I always want to help my friend, Senator Graham.

(CROSSTALK)

(LAUGHTER)

FRANKEN: You said there are -- are three things that judges hold to when they're not activists. You said this. They respect precedent. They make narrow decisions. And they defer to the political branches, in other words, the legislature.

And there are a lot of recent cases that we've been talking about that instinctively strike me and - and a lot of other people as falling outside of these three guidelines. I think that these -- in these cases, the Supreme Court was legislating from the bench, which is being activist.

In *Circuit City*, which I discussed at length during my first round, the Supreme Court explicitly ignored, explicitly ignored Congress. It gave absolutely no deference to Congress's intent. And this is on the specific provision protecting all workers from mandatory arbitration.

And the court read that provision in such a strained manner that even though the legislative history indicated a quite different intent, that provision would exclude almost all workers. In *Gross* and in *Rent-A-Center* and in *Citizens United*, the court answered questions that it wasn't asked.

They didn't rule narrowly. That was your second. In the *Legion* case, the court struck down a century-old precedent. That's your third. That protected small business owners against vertical price-fixing.

So those are all three of your conditions. Ignoring Congress, the intent, ruling -- not ruling narrowly and overturning precedent. So I think that the judges who decided these cases are judicial activists. Under the guidelines that you laid out to senator -- my friend Senator Graham and that he - they seemed to like.

Now, let me distinguish this from -- from Justice Thurgood Marshall. Justice Thurgood Marshall argued *Brown v. Board of Education* as you and Senator Graham discussed, correct?

KAGAN: Yes, he did.

FRANKEN: And if I lumped *Brown v. Board of Education* in with the list of cases I just mentioned, most people in the room would balk, don't you think?

KAGAN: Well, *Brown v. Board of Education* is the kind of iconic case that doesn't belong on any list.

FRANKEN: Well, there's a reason that -- I mean, it is an exemplar of overturning a precedent that need to be overturned. Is that correct, would you say?

KAGAN: Yes, sir, Mr. Franken, yes.

FRANKEN: And that's because there is a place for judicial review in our legal system. I'm trying to make the distinction between judicial activism and not judicial activism. There are certain situations where the Supreme Court really should subject the law to heightened scrutiny. And this is what I think Justice Marshall was talking about when he said that the court should show, quote, "special solicitude for the despised and disadvantaged, the people who went unprotected by every other organ of government, and who had no other champion."

Now, in the opening statements, you were criticized for admiring Justice Marshall for believing this. But I actually think that this belief, that Justice Marshall's belief, is just good constitutional law. Are you familiar with *Carolene Products* -- the *Carolene Products* case of 1938?

KAGAN: Yes, sir.

FRANKEN: Are you familiar with footnote four of that decision?

(LAUGHTER)

KAGAN: Yes, sir.

FRANKEN: And you're familiar with that because a footnote is really important, isn't it? It's often taught in constitutional law classes, whether they be in the first year or the second year or the third year, right?

KAGAN: It is.

FRANKEN: Can you tell me what that footnote says and why it's important?

KAGAN: Senator Franken, it seems as though you have it in front of you and you're going to do a better job of it than I am at this moment.

FRANKEN: You're a mind-reader. Footnote four basically says that when courts interpret the Constitution and try to figure out whether a law complies with the Constitution, court should give special scrutiny to laws that violate a specific part of the Constitution, that restrict the political process and that affect, quote, "religious, national, racial, and discrete and insular minorities who have a really hard time getting help through the normal political process."

Now, to me, "discrete and insular minorities" sounds a lot like the "despised and disadvantaged that go unprotected and have no other champion." Is it safe to say that Justice Marshall's belief is consistent with *Carolene Products*?

KAGAN: Well, there's no doubt, Senator Franken, that racial classifications are subject to very high scrutiny under the Equal Protection Clause and have been so for a long time. And the Equal Protection Clause exists to ensure against discrimination on disfavored bases, very much including -- and the archetypal example is race.

And that it is not only appropriate but obligatory on the courts to enforce that prohibition on discrimination on the basis of race.

FRANKEN: So Justice Marshall's belief that was criticized in the opening statements is really very consistent with established constitutional law, isn't it?

KAGAN: Well, Senator Franken, I will say that when I wrote those words, I was not speaking of footnote four on the *Carolene Products*. I was speaking instead of what I've talked about several times at this hearing, which is Justice Marshall's deep belief in ensuring a level playing field for all Americans and ensuring that each and every American, regardless of wealth or power or privilege, that each and every American gets fairly heard before the court. And -- and when I -- when I wrote that tribute to Justice Marshall and wrote those words, that was very much what I had in mind.

FRANK: So I'd like to leave you with this thought, General Kagen. Justice Thurgood Marshall is one of the greatest lawyers and jurists in American history. This is the man who won *Brown v. Board of Education*, who helped end segregation in our nation's schools, and opened the doors to black Americans. This is the man who proved that separate but equal was inherently unequal. Not only that, but he served with distinction as solicitor general, as a judge on the Second Circuit, and as the first African American Supreme Court justice. This is a giant of the American legal system.

And I think what I really want to say is that Justice Marshall wasn't some activist radical. Rather, his views were very much in the mainstream and in line with constitutional jurisprudence since 1938, since *Carolene* and before that. And I just think we need to be aware of that and to remember that.

KAGAN: Senator Franken, I'll just say what I've said on many occasions in the past, which is that Justice Marshall is a hero of American law and a hero of mine.

FRANKEN: And of mine. Thank you.

LEAHY: Thank you, Senator Franken.

I'm going to yield to Senator Sessions, but I've always told this -- Senator Klobuchar wanted to correct one...

KLOBUCHAR: Yes, we have learned from many e-mails to our office that in fact in 1980, Solicitor General Kagan, Nancy Kassebaum was already serving in the Senate. There was in fact one woman senator. There were no women on the Judiciary Committee. And I was correct, "Call Me" from Blondie was the top song. I wanted to make that -- and I assume it doesn't change any of your answers.

KAGAN: Isn't e-mail a wonderful thing? You can learn you're wrong right away.

(LAUGHTER)

KLOBUCHAR: It is nice, thank you.

LEAHY: Trust me. I do.

(LAUGHTER)

Personally, as some of the one that have come in (inaudible).

Senator Specter, you just wanted to put a letter into...

(CROSSTALK)

SPECTER: Yes, Mr. Chairman. Following Senator Franken's questioning, I asked consent that a letter dated May 11, 2010 from Senator Casey and me to the chairman and all the members of the Federal Communications Commission regarding the NBC-Comcast merger be placed in the record.

LEAHY: Without objection, so ordered.

SPECTER: I thank the chair.

LEAHY: We will go to Senator Sessions and then to Senator Hatch, and (inaudible) Senator -- let's see, who else? -- Senator Graham, did you want more? And then Senator Coburn, you want more?

Senator Sessions?

SESSIONS: We're doing our best to be cooperative.

LEAHY: I've, too, withheld my -- most of my time for my second round

SESSIONS: You are very generous. While we would normally be going into tomorrow for these hearings, because of extraordinary events of the week, Mr. Chairman, I'm glad to work with you to try to finish up tonight, and we'll do our best to do that.

LEAHY: I would note again for the record, Senator Sessions has been extraordinarily cooperative in trying to do that,

SESSIONS: But I know you know that this is not a little matter. This is a very, very significant matter. A nominee could serve, if she serves as long as Justice Stevens -- What, 30? -- Justice Stevens, 34 years, 38 years on the bench. And we wish you a productive service, if that occurs.

I would say as to what kind of agenda you should bring to bear, I think the oath sets a good agenda. The oath is that you would impartially do your duty, with equal rights to the poor and the rich, without respect to persons under the Constitution and laws of the United States.

And I guess I would add a question, and ask you a question that one columnist I saw, a professor said: Would you do so without any mental reservation or purpose of evasion?

KAGAN: Senator Sessions, I agree with you that that's exactly what I should be doing if I'm fortunate enough to be confirmed, and I would do so without any mental reservation or purpose of evasion. It feels a little bit odd to be taking what seems like that oath at this table.

SESSIONS: A bit early, but it's not an exact copy. You talked about Miguel Estrada. I so admired him and still do, and I think without doubt spoke more on the floor in support of his confirmation than probably any other senator.

One of the big issues that occurred was whether or not the internal memoranda of the Department of Justice should have been produced so that people in the Senate, mainly my Democratic colleagues who filibustered his nomination and kept it from ever coming up to a vote, which he would have been confirmed had that occurred, their objection in large part seemed to be that those internal memoranda should have been produced. Whereas, every living attorney general, every living former solicitor general, wrote that those documents should not be produced.

So I guess I would ask you, Solicitor General, do you think now that you should produce those documents? Or do you think the better policy is the one the Bush administration pursued which was not to go down the road of producing such documents?

KAGAN: Senator Sessions, before you said it, I was just going to say that, in fact, every living solicitor general did say that those documents ought not to be produced, and they said that because of an understanding about how the office works and how important confidentiality within the office is to effective decisionmaking. And I think that that's absolutely right. And it's one of the reasons why I haven't wanted to talk about any internal deliberations that have occurred within the office, and I certainly think that it's the -- it was the right view then that those documents from with the office should not have been produced.

SESSIONS: Well -- and you would say, I have been interested in what might be in those internal documents you were involved in in the solicitor general's office, but have refrained from asking for it. But based on that answer, I assume that you would advise other members of the Senate that in the future, they should not be demanding such documents of a nominee, absent some special discrete problem that may justify in an unusual case.

KAGAN: I do think that the Office of Solicitor General is a very special kind of office where candor and internal, really, truly thorough deliberation is the norm. And that it would very much inhibit that kind of appropriate deliberation about legal questions if -- if documents had the potential to be made public generally in that way.

SESSIONS: Thank you.

In the United States Code 983, the Solomon amendment, I believe the last of the four amendments that we passed to try to make sure our law schools couldn't continue to get around it some way and find a loophole, says this -- that the military must be given access, quote, "that is at least equal to the access to campus and to students that is provided to any other employer."

My question to you is: During the entire time you were dean, did you give the military at least equal access to any other employer?

KAGAN: Senator Sessions, our consistent view was that we were in compliance with the Solomon amendment. Of course, the Department of Defense determined otherwise, and when the

Department of Defense determined otherwise, we complied with what the Department of Defense asked of us.

SESSIONS: I don't think that answered the question.

SESSIONS: I do not think there's any doubt that they were -- that they were not given equal access to the campus.

It was based on a decision you made to reverse previous Harvard policy. And I just remained troubled that we can't seem to get in sync on that issue. It's a big problem for me.

My colleague asked about judicial activism. I would say that Judge Barak's statement that Lindsey Graham read is a classic. He says, "The statute remains the same as it was, but its meaning changes because the court has given it a new meaning that suits new social needs," close quote.

I believe an activist -- and I think I'm quoting Senator Hatch, although he wouldn't give me credit for it -- he wouldn't take credit for it -- my view of an activist judge is one who allows their personal, political, ideological, religious or other views to cause them to not be faithful to the law.

And when justice -- I know you're rushing me, Mr. Chairman.

LEAHY: Not rushing you.

SESSIONS: You keep breaking my little chain of thought. It's so easy. My brain is -- is weak. But Justice...

LEAHY: Probably it's the third or fourth...

(CROSSTALK)

SESSIONS: ... Marshall -- well, I guess that Solicitor General Marshall and -- and -- and the courts who ruled on -- against separate but equal, I do believe, in my mind, by my definition, that was a decision consistent with the plain words of the Constitution, that when you said a child can only go to this school because -- couldn't go to this school because of the color of the skin and another one must go to that school simply because of the color of their skin, that is not equal protection.

So I think they just simply returned to the plain words of the document. And there was evidence that the people who drafted it had that in mind. But I think originalism has its limits. Each theory has its limits.

But fundamentally, I think it's not activism to reverse a bad decision. And -- and the courts should do that, and the courts who fail to set aside bad decisions that are not in harmony with the law are failing in their responsibilities.

And, Mr. Chairman, one more -- because I didn't quite understand. I thought that Harvard had abandoned any constitutional law course requirement. You and Senator Grassley, I think, talked about first-year law school requirements of constitutional law. Is there -- is there a requirement at Harvard in any year that they take constitutional law?

KAGAN: Senator, at least as far back as when I was a student, there has actually not been a requirement that constitutional law is taken, but almost all students take a very great deal of constitutional law.

SESSIONS: But international law was required recently, a course in international law was required recently?

KAGAN: When we -- when we reviewed our first-year curriculum, we determined really, because the constitutional law professors at the school wanted to keep constitutional law in the second and third year, where it could be taught more in-depth and more broadly, where students would have really greater time to study it, that the constitutional law professors thought that it would not be a good idea to put it in the first year.

Some constitutional law actually we did put into the first year and, of course, on the governmental process, and particularly that deals with separation of powers law.

In general -- and this has been true for a long time -- Harvard has taught constitutional law in the second and third year, where there aren't requirements, but the vast majority of students take a very great deal of constitutional law.

SESSIONS: Well, I think that yesterday you indicated that the court could consider foreign court opinions as they could, quote, "learn about how other people might approach," close quote, and think about approaching legal issues.

And you said, "Well, I guess I'm in favor of good ideas coming from wherever you can get them." I think some of the justices on the court have used that phrase, but ideas sound like policy to me. It does not sound like authority to me.

The -- I guess I want to ask you, there's a raging debate on the court and within the legal community over the propriety of citing foreign law in opinions as providing guidance. Justice Stevens in the McDonald firearms case Monday dissented and cited, quote, "the experience of other advanced democracies," close quote, regarding their gun restrictions.

We've got a constitutional amendment that says you have the right to keep and arms. He wants to consider the experience of other advanced countries.

LEAHY: (OFF-MIKE)

SESSIONS: All right. And now this is my last question.

And -- and -- and he went on to say, while the American perspective must always be our focus, it is silly, indeed arrogant to think we have nothing to learn about liberty from the billions of people who live beyond our borders.

And Justice Scalia noted with some sarcasm -- sarcasm that no determination of what rights the Constitution of the United States covers would be complete, of course, "without a survey of what other countries do," close quote. In other words, he was saying, he thought this was a very unwise policy.

So I guess you -- I would ask you, whose side are you come down -- do you come down on, Justice Scalia's or Justice Stevens'?

KAGAN: Well, Senator Sessions, I haven't read the McDonald case, so I haven't read what either Justice Scalia or Justice Stevens has to say about that question. It's -- it's -- it's interesting that you say this, ask this with respect to the Second Amendment, because I think that I was asked about this question during my S.G. confirmation, was give an written question about whether I thought that the use of foreign law was appropriate in the context of the Second Amendment.

And I -- I -- I hope I'm remembering this correctly, that I said it was not, that the Second Amendment question, as defined by Heller, was so peculiar to our own constitutional history and heritage that -- that, you know -- that -- that foreign law didn't have any relevance.

So I hope I'm paraphrasing that accurately, but I know I wrote about it to the Senate previously.

SESSIONS: Thank you, Mr. Chairman.

LEAHY: Thank you.

I will also put on the record -- you'd mentioned solicitors general. We have a letter directed to Senator Sessions and myself signed by solicitors general in the administrations of President Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush, all supporting you, Ms. Kagan, to be on the Supreme Court. It's signed by Charles Fried, Kenneth Starr, Drew Days, Walter Dellinger, Seth Waxman, Ted Olson, Paul Clement, Gregory Garre, all supportive. And I'll put that in the record.

And, Senator Grassley, you're recognized.

GRASSLEY: Yes. If you answer the question short, I won't need the 13 minutes and 10 seconds that Senator Sessions just took.

(LAUGHTER)

KAGAN: You were counting, huh?

GRASSLEY: OK. Here's where we are. I want to make one statement, because I didn't want you to have the last word on Baker and settled law. So I'd make this clarification, and you don't need to comment.

My question on precedential value of Baker was whether Baker is binding and settled law on lower courts until the Supreme Court revisits the issue. The Supreme Court has stated, quote, "Lower courts are bound by summary decisions by this court until such time as the court informs them," in parentheses, "that they," in parentheses, "are not," end of quote.

So until the Supreme Court speaks directly in response to the issue in Baker, it seems that the court precedent supports the position that Baker is settled law and should control in the lower courts.

KAGAN: Senator Grassley, may I?

GRASSLEY: You may.

KAGAN: This is not an area which I know a great deal about, so I thought that I was stating, you know, what Senator Leahy called hornbook law on this question. But it's not an area that I've studied in any depth, and I look forward to being further informed about it.

GRASSLEY: OK, thank you. I want to go to the fact, in 1996, Congress passed and President Clinton signed into law the Defense of Marriage Act. That law defines marriage for purposes of federal law as between one man and one woman and also provides that no state or territory shall be required to give effect to another state that recognizes same-sex marriages.

GRASSLEY: Both provisions have been challenged as unconstitutional and federal courts have upheld both.

Do you agree with federal courts which have held that DOMA does not violate the full faith and credit clause and is an appropriate exercise of Congress' power to regulate conflict between the laws of states?

KAGAN: Senator Grassley, I do think that that's an issue that might come before the court, the constitutionality of DOMA, so it would not be appropriate for me to comment on it.

GRASSLEY: OK. Let me move on, then, a little bit along the same line, but a different approach.

Whether or not you played any role in approving or reviewing the reply memorandum in support of defendant United States' motion to dismiss the case of *Smelt v. United States*.

If so, could you please explain why the Justice Department abandoned the argument that traditional marriage rationally served the legitimate interest of promoting the raising of children by both parents, which Congress could reasonably conclude is the optimal environment for raising children?

KAGAN: Senator Grassley, this was not a case in which I was the decision-maker. It was a case in district court, and the solicitor general's decision-making responsibilities take over in the appellate, at the appellate court level.

It was a case in which members of my office and I reviewed some briefs and participated in some discussions. And I think I would need to say with respect to those discussions that, you know, I can't reveal any kind of internal deliberations of the Department of Justice, but just to say that, in general, lawyers do make a raft of decisions, strategic and otherwise, about how best to present cases, and the Department of Justice is right now defending the DOMA legislation in the courts in that case and in a couple of others.

GRASSLEY: Do you believe that it was necessary to note in the reply memorandum that, quote, "Administration does not support DOMA as a matter of policy, believes that it is discriminatory and supports its repeal," end of quote?

Do you believe such language is consistent with your promise to vigorously defend the statutes of our country?

KAGAN: Senator Grassley, I'm -- I'm -- I'm reticent to talk about particular decisions made with respect to that brief, not only because I was not the decision-maker on that brief, but because the Department of Justice is currently litigating those cases, and I don't want to do anything that interferes or undermines or, you know, in any way gets in the way of the defense that the Department of Justice is making on those cases.

GRASSLEY: OK. Well, you took an oath to defend the laws of the United States, including DOMA. Would you agree that calling a law discriminatory and advocating for its repeal is no defense?

KAGAN: Senator Grassley, I do believe that the Department of Justice is vigorously defending DOMA in that case and in other cases.

GRASSLEY: OK. On another matter, in *Griswold*, Justice William Douglas stated...

LEAHY: Excuse me. How much more time would the senator like?

GRASSLEY: I want less than what Senator Sessions has.

LEAHY: Well, Senator Sessions, of course, the ranking member by tradition...

(CROSSTALK)

GRASSLEY: Oh, well, then, can I -- can I have two more minutes?

SESSIONS: Mr. Chairman, I think he can have more...

(CROSSTALK)

LEAHY: ... two more minutes, I want to give it to him. But I just want to know just because we have to plan for the...

GRASSLEY: This will be the last...

(CROSSTALK)

SESSIONS: And we could be so pleased that he can be ranking member next year.

(LAUGHTER)

You should be nice...

(CROSSTALK)

LEAHY: I would miss you so much. I don't know if I could handle that.

Go ahead, Senator Grassley.

GRASSLEY: Don't worry.

LEAHY: Never mind. Just go to the (inaudible)

GRASSLEY: Why should I -- in *Griswold*, Justice William Douglas stated that although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the penumbras and emanations of the Constitution.

A two-part question. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by, quote/unquote, "reading between the lines"? Is it appropriate for a judge to go searching for penumbras and emanations in the Constitution?

KAGAN: I think, Senator Grassley, that rights have to have textual bases, and so I would not subscribe to the Justice Douglas approach on penumbras and emanations.

I do, as I think every nominee has, support the result in *Griswold*. I think that the way other justices have understood that result, as properly justified, is through the liberty clause of the 14th Amendment.

GRASSLEY: Well, then I think from your answer, which I like, is that you do not -- you would not say that there's a lot of other rights that are implicitly written into the Constitution, then?

KAGAN: I do believe that rights need a textual basis in the Constitution and they might have that basis in general clauses, but there is -- there needs to be a textual basis in the Constitution for any right.

GRASSLEY: OK. Then the last point would be a continuation of this, and I think you probably answered it, but let me tell you why I ask these questions: because of somebody called Justice Souter.

Some judges found way to make law through the penumbras in the Constitution. Justice Souter in his confirmation hearing told me that the courts fill vacuums in the law. Justice Sotomayor has said that the court of appeals is where policy is made.

If you're confirmed, will you try to find a creative way to make policy from the bench based upon penumbras or Souter's vacuums?

KAGAN: Senator Grassley, I've tried during the course of this day and a half to state how I would approach constitutional interpretation, that where the text governs, the text governs. Where more work needs to be done, what judges ought to look to is the structure of the Constitution, the history of the Constitution and the precedents relating to the Constitution, and that's what I would do in any case.

It's law all the way down, I think is what I said yesterday, and that's what I believe. It's not personal views. It's not moral views. It's not political views. It's law all the way down.

GRASSLEY: I gave you an opportunity to sum up two days of what you've been trying to tell us. Thank you. And I was five minutes short of where (inaudible).

LEAHY: (inaudible) I found when the Republican were in control and I was ranking member, they always gave me a little bit extra, and Senator Sessions has never been cut off by me.

Senator Graham, did you have anything?

Senator Coburn, how much time would you like?

COBURN: Less than 10 minutes.

LEAHY: You're recognized. Go ahead.

COBURN: Thank you.

Well...

LEAHY: And then -- and then at that point, just so people know on the schedule, when Senator Coburn finishes, I know you have a short ending statement I think you want to make. I will, too. We will break for about 15 minutes and then reconvene in the -- regular (ph) room, right? -- the regular (ph) room, which has been secured by the people who do that for the...

(LAUGHTER)

I've only been here for 36 years. I'm still learning my way around.

Senator Coburn, go ahead.

COBURN: Thank you, Mr. Chairman.

And, again, thank you for your testimony and your answers to our question. I know it hasn't been the most pleasant experience in the world but this is my fourth one and I think this has been one of best.

KAGAN: Senator Coburn, I want to say that I think it's been terrific, that everybody has been very fair and very considerate, and I hope you found it informative. I found it somewhat wearying, but actually a great moment in my life.

COBURN: Just a couple of questions, and hopefully I won't use all 10 minutes.

I was interested in your discussion about the economic versus non-economic test on the commerce clause, and just what your feelings were on whether or not that test supersedes original intent.

KAGAN: Well, Senator Coburn, I think this goes back to the -- some of the discussion that we were having yesterday. And as I understand the court's commerce clause law, that test is the governing test, which is entitled to the weight that precedent usually has.

KAGAN: And that means that it's not enough to say that the -- the decisions are wrong. And -- and it doesn't matter why the decisions are wrong. It doesn't matter whether the decisions are wrong because they are contrary to original intent or -- or some other reason why people might think that decisions are wrong.

The point of precedent is -- is to constrain judges. The point of precedent is to remind judges that they don't know everything and that they should rely on sort of the wisdom of the courts and of other judges over time. And I think that -- and the point of precedent is to provide stability and reliability in the law.

And I think that those values govern, even though somebody might come in and say a decision is wrong. And that's true if the person said the decision is wrong, because it violates the text or it violates the history, the original history, or it violates anything else, that there -- that there is a -- there -- there needs to be a kind of high bar for reversing precedent.

COBURN: All right. But that does not preclude that precedent can be reversed.

KAGAN: It -- it can be reversed. And we've talked to various -- on various occasions about when it can be reversed, and in particular that if there is -- if the precedent is unworkable or if the precedent's doctrinal support has eroded or if the precedent no -- or if the precedent no longer fits the actual factual and empirical circumstances that exist in the country. There are occasions on which precedent can be reversed.

COBURN: Let me go on to another section, if I might -- the coercion test that you discussed. Do you find it ironic that the -- the coercion test applied to graduating seniors from high school, who are old enough to go and die for this country, but the coercion test says they're not old enough to make a decision about what's something they hear? Is that ironic to you?

KAGAN: Senator Coburn, I've -- I've tried hard not to characterize particular decisions, not to degrade them, not to give them a thumbs up or thumbs down.

COBURN: You would admit there is some irony in that, though.

KAGAN: Senator Coburn, when I talked about this with -- I forgot who I talked about it with...

COBURN: I do, too. I forgot who you talked to about it as well.

KAGAN: I did -- I did talk about how one of -- one of the, I think -- an attribute of the coercion test is that deep, you know, four different people can look at a practice and have four different views as to whether coercion has in fact taken place. I think -- I think everybody would say that adults are different than children.

I think the question of, you know, sort of who counts as a child and two counts as an adult is one of those matters that -- that I think the coercion test is -- notably presents that different people can

look at the same set of facts and reach different conclusions as to whether the government in fact has engaged in course of activity.

COBURN: Thank you. And my -- I have two final questions. One, was there at any time -- and I'm not asking what you expressed or anything else -- was there at any time you were asked in your present position to express an opinion on the merits of the health care bill?

KAGAN: There was not.

COBURN: Thank you. And final question, it's your testimony before this committee that you had no efforts at all to influence the decision by ACOG in terms of what they ultimately put out on partial- birth abortion.

KAGAN: That might only dealings with ACOG were about talking with them about how to ensure that their statement expressed their views. I was a, you know, a staffer with no medical knowledge. I would not have presumed to, nor would ACOG have thought it was relevant for me to.

COBURN: But -- but there -- but you worked hard, or at least you acknowledge being part of the people who developed the four options for President Clinton.

KAGAN: Yes, I -- I definitely participated in discussion of this issue.

COBURN: And you referenced that that was "our memo," correct, in other memos to the president?

KAGAN: Yes, I mean, I -- I definitely participated as an aide in trying to implement the president's views on this issue.

COBURN: And you were concerned with their original language. That is true.

KAGAN: I -- I was...

COBURN: ACOG's original language you were concerned with. It was problematic.

KAGAN: I was concerned that that language did not adequate -- did not accurately reflect what ACOG's views were and what they have expressed to us about their views.

COBURN: Yes, their original language, having somebody -- being somebody that's delivered thousands of they be -- where it was absolutely accurate. Their second language was not accurate. And I would think that the vast majority of those who have been through my experience would agree with that.

I have no other questions for you. I thank you for the spirit in which you answered the questions here today. As it was said in the paper today, you kind of light up the room. I agree with that. Congratulations on your nomination.

KAGAN: Thank you so much, Senator Coburn.

LEAHY: Thank you.

COBURN: And that's three minutes early, Mr. Chairman.

LEAHY: That's what?

COBURN: Three minutes early.

LEAHY: God bless you. I will -- I will put it on the -- I will it on your positive ledger.

COBURN: I know the -- I know the chairman remembers when he was a lowly, low-ranking member of the Judiciary Committee some 35 years ago.

LEAHY: I have so many stories I'm not going to do with the television, but I'll tell you a couple of them afterward. But I'll put the extra three minutes in your ledger, which was...

COBURN: Thank you.

LEAHY: ... kind of empty, but now it's very full.

Senator Sessions, you wanted to make a -- a short closing, I understand.

SESSIONS: Well, I -- I would be pleased to. First, I would offer a number of letters for the record from a Colonel Gonzalo Vergara, who would oppose the nomination, Judicial Action Group, the National Right to Life Committee, Military Families United, (inaudible) Council, Southern Baptist Ethics and Religious Liberty Commission, American Association of Christian Schools, and Center for Military Readiness, who have expressed opposition to the nominee.

You know, we talked about a lot of important issues today -- the interstate commerce issue -- several of our committee members asked about it; Lopez, Morrison, a five to four decision; foreign law -- it's a raging debate within our country today.

I do not see how anyone can justify a citation to actions outside the country as any authority whatsoever to define what Americans have done. Americans believe that you only govern with the

consent of the governed, and we have not consented to be governed by Europe or any other advanced nation.

People are concerned about abortion issues. They are concerned about national security. And we've had raging debates in our conference over that.

I think this nominee out of private life wrote a very intemperate letter about some of those issues that causes me concern -- the ownership of firearms. We've had two seminal cases, five to four, that had it been one vote switched, it would have been five to four, completely eviscerating the right to keep and bear arms, allowing any city or any county in America, any state to completely deny the people the right to keep and bear arms.

People are worried about that. Senator Coburn has been -- some of the things he's saying...

Tom, I'm hearing as I go around my state, people are concerned and asking the question is there any limit on what you do in Washington? Does anybody care? We do. We're tired of this. We're worried about this. And I think their worries are legitimate. I don't think it's extreme.

We talked about activism. Just as Barack says, you know, you give just the words -- the words don't change, but you give them you meaning that seats -- suits new social needs.

Well, I know you said he's your hero. I'm sure you are correct that you know not all of his philosophy, but many judges in the court system in America today are not too far from that, I believe. And I believe some of those judges are not fulfilling their oath. And I'm not going to vote for a judge I do not believe is committed to that.

And I'm worried about the idea of legal progressivism. I think that's a pernicious philosophy. A liberal ideal has always had -- I've had -- now, I do admire the liberal ideal if the American tradition, but this progressive movement I think is particularly hostile to same law. And I'm not pleased with it.

And the president, I think, as Mr. Clain (ph) said, is a legal progressive -- or Mr. Greg Craig, his counsels, have said, and indicate that you are, Ms. Kagan. So I worry about that.

And just -- I would just say with regard to the discussion about Harvard and the military, I am concerned about the way you've overall described what happened, suggesting that it really wasn't that big a deal, and that you always wanted to help the military.

I was involved in writing the Solomon Amendment, several different versions of it. It took four times to get it so the deans around the country couldn't figure way to get around it. It was a national debate. It was very intense at Harvard. And I do believe that your actions -- I think your actions there were not consistent with the law.

And so our nominee is a person of skill and intelligence, who has a diverse background. I do think that this Senate has a very serious responsibility at this time, when people are deeply worried about our Constitution and is it being followed, they want to know that the next nominee to our Supreme Court will be faithful to that Constitution, even if they don't like it.

And some of the things you've said today have indicated that. But a combination of record and statements leaves me uneasy. So I look forward to studying that record and trying to fairly and objectively make my evaluation of whether I should vote for you for the Supreme Court of the United States.

Thank you, Mr. Chairman.

LEAHY: Solicitor General Kagan, the good news is that this is, in all likelihood, the last time you will ever have to be in a public hearing before the Senate Judiciary Committee. Some of us have probably enjoyed it more than you have. But I have appreciated your -- not only your intellect, but your good humor throughout.

SESSIONS: I agree.

LEAHY: I said to somebody -- so we do agree on something.

SESSIONS: Yes.

(LAUGHTER)

LEAHY: I said to somebody earlier today, mentioned that I've been here throughout all of the hearings. I said it was like going back to my favorite courses in law school. You patiently listen to our statements. You've answered our questions over the last three days.

Yesterday you testified 10 hours. Today you've been here since 9:00 this morning. Each senator, both sides, participated in a 30-minute opening round. Some took the opportunity for another 20-minute round. Some have gone beyond that, over an hour.

And, of course, I would mention for the public watching, this is in addition to our other interactions with you, all of us, that we do privately, you have -- I know speaking from my views, when I met with you, you answered openly and candidly every single question I asked.

I appreciate that you've engaged with the senators. You've answered their questions more fully than many recent nominees. Some senators on both sides of the aisle have liked and agreed with some of your answers, they've differed with others. That, based on my experience, is not unusual in hearings.

Based on my review of your record and now your answers, this week I expect that you and I will not always agree. I do not agree with every decision that Justice Stevens has written, or Justice O'Connor, or Justice Souter.

But I have such great respect for their judgment. I respect their judicial independence, and I have never once regretted my vote for each of these justices, I mentioned these three, each were nominated by a Republican president. I voted for each of them. I've never regretted those votes for each of them.

I hope the senators and the American people have a better sense of the kind of justice you would be. You demonstrated an impressive (INAUDIBLE) encyclopedic knowledge of the law, and we can see why so many of your students, and many of whom I've met here during these hearings, consider you a wonderful teacher of the law.

I told my wife last night, I really wish I could be back in law school, taking a course with you. You spoke about your approach to law, to judging. You consistently spoke of judicial restraint, and your respect to our democratic institutions, your commitment to the Constitution, the rule of law.

You demonstrated a traditional view about deference to Congress in judicial precedent, a view that conservatives used to embrace and fortunately few still do. I'm pleased that over 1,000 members of the public were able to attend your hearings in person. Thousands more watched your confirmation hearing live on television. And we streamed it online through the Judiciary Committee Web site.

Now, I believe the country needs and deserves a Supreme Court that bases its decision on the law and the Constitution, not politics or an ideological agenda by either the right or the left. No justice should substitute his or her personal preferences and overrule congressional efforts to protect hard-working Americans pursuant to our constitutional role.

Judges have to approach every case with an open mind and a commitment to fairness. And I respect your pledge, and I take so seriously what you pledged to all of us here, that you will do your best to consider every case impartially, modestly, with a commitment to principle, in accordance with law.

Solicitor General Kagan, I believe you. We stand recessed.

END

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