



Elena Kagan: Confirmation Hearing Questions

General Questions

- 1) *Stare decisis* is a long-established legal principle that represents the weight that should be given to legal precedent. The strong emphasis the legal system gives to following precedent is meant to protect society from jarring changes to settled law. As Solicitor General of the United States, you have been responsible for forming the government's position on cases that reach the Supreme Court, and articulating that position before the justices. If you are confirmed to a seat on the Supreme Court, your role will obviously be very different than the one you hold today. Taking into account the various legal positions in which you have served – federal law clerk, associate White House counsel, dean of Harvard Law School, and now U.S. Solicitor General – what thoughts can you share with the committee regarding your take on *stare decisis*? Having never before served as a judge, can you commit to upholding this principle in your judicial approach?
- 2) If confirmed to the Supreme Court, you will be only the fourth woman justice in United States history, and the Supreme Court will for the first time have three woman justices serving concurrently. As you may know, the number of woman judges on our federal courts is low. As of May 2010, only 48 of the nation's 163 active federal appeals court judges were women – less than 30 percent. An even smaller percentage of women judges constitute the current makeup of the federal district courts. As the first woman to serve as dean of Harvard Law School and U.S. Solicitor General, can you comment on the impact of the lack of women serving as federal judges? If confirmed, do you plan to utilize your noteworthy platform to encourage more women into judicial careers?

Reproductive Rights

- 1) The U.S. Supreme Court's 1973 ruling in *Roe v. Wade* legalized abortion for all women and found abortion to be constitutionally protected within the right to privacy as established by *Griswold v. Connecticut*. In your view, was *Roe v. Wade* correctly decided?
- 2) In 1994, in *Madsen v. Women's Health Center*, the Supreme Court upheld a Florida injunction creating a 36-foot buffer zone outside the entrance of an abortion clinic and prohibited excessive noise that could be heard inside the clinic. In your view, did the Court render a correct judgment? And do you agree with the various ruling by multiple federal courts of appeals that have upheld the constitutionality of the Freedom of Access to Clinic Entrances (FACE) Act that was signed into law that same year?
- 3) According to recently released documents, during your time as deputy director of the White House Domestic Policy Council, you advised President Bill Clinton about legislation dealing with late-term abortion procedures. Specifically, you advocated that the Clinton administration support a compromise bill offered by then-Sen. Tom Daschle (D-SD) which would have banned post-viability abortions, with exceptions for both the

life and health of the woman. Since that time, the Supreme Court has handed down multiple rulings with respect to late-term abortion laws. In *Stenberg v. Carhart* (2000), the Court struck down Nebraska's late-term abortion law because it did not contain an exception for the woman's health; a few years later, however, in *Gonzalez v. Carhart* (2007), the Court upheld a federal late-term abortion ban even though that law did not include an exception for the woman's health either – the first time the Supreme Court had ever upheld an abortion ban law that did not contain a woman's health exception. In your view, particularly in light of the work you performed in the Clinton administration described earlier, in which of these two cases did the Supreme Court get it right?

Employment Discrimination

- 1) In 2007, the Supreme Court decided the case of *Ledbetter v. Goodyear Tire & Rubber Co.* As you may know, Lilly Ledbetter worked for nearly two decades for Goodyear. Despite receiving top performance awards, she discovered that she had been paid significantly less than male co-workers with the same job. After her November 1998 retirement, she filed suit under Title VII of the Civil Rights Act of 1964 and was awarded back pay and other remedies in a jury trial. The verdict was appealed and eventually reached the Supreme Court. In a 5-4 decision that overturned years of precedent and flew in the face of the principle of *stare decisis*, the Court not only erased Ledbetter's award, but also left women, minorities, and others in Ledbetter's situation with virtually no recourse to pay discrimination. In January 2009, President Barack Obama signed a law overturning this harmful decision, restoring the paycheck accrual rule and the ability of those who suffer from pay discrimination to have their day in court. Had you been a justice when the Supreme Court heard this case, how would you have ruled?

Title IX

- 1) Title IX of the Education Amendments of 1972 is the federal statute prohibiting sex discrimination in education programs and activities that receive federal financial assistance. Title IX affects all areas of education, and has made it possible for women to pursue careers as lawyers, doctors, mechanics, scientists and professional athletes. Title IX applies to institutions receiving federal funds and addresses such important areas as access and admission to higher education, equity in educational subjects, athletics, and sexual harassment. In 2005, the Court decided *Jackson v. Birmingham Board of Education*, in which Roderick Jackson, a high school women's basketball coach, claimed he was fired for complaining that his team was denied equal treatment by their school district. Jackson sued under Title IX, arguing that the school district unlawfully retaliated against him for reporting sex discrimination against his players. The Court agreed, finding that individuals who protest sex discrimination may sue under Title IX if their schools retaliate against them, even if the reporting individual was not the direct target of such discrimination. Do you agree that Title IX protects whistleblowers such as Mr. Jackson?

“Don’t Ask, Don’t Tell”

- 1) Under the terms of the Solomon Amendment, federal funding can be denied to postsecondary institutions which prohibit or prevent military recruitment on campus. During your tenure as dean of Harvard Law School, you supported a lawsuit seeking to overturn the Solomon Amendment on the grounds that the military’s “Don’t Ask, Don’t Tell” (DADT) policy with respect to gays in the military was “a moral injustice of the first order.” When the Solomon Amendment was temporarily ruled unconstitutional by a federal appeals court, you prohibited military recruitment on Harvard’s law school campus on the basis of the school’s antidiscrimination policy. When the Supreme Court later reversed the appeals Court decision, you allowed recruiters back on campus but continued speaking out against DADT. Do you agree with the federal appeals court decision that overturned the Solomon Amendment, or do you believe the Supreme Court was correct to reinstate it? Moreover, do you as a matter of personal conscience support recent efforts to overturn DADT?

School Vouchers

- 1) In *Zellman v. Simmons Harris* (2002), the Supreme Court upheld the constitutionality of Cleveland, Ohio’s private school voucher program. In so doing, however, the Supreme Court did not legalize all such programs; for instance, according to the holding, voucher programs that create “financial incentives that skew [parents] toward religious schools” are impermissible. Some private school voucher programs, such as the DC Opportunity Scholarship Program, run afoul of this rule. The DC program also permits discrimination in hiring and student admissions, further violations of the *Zellman* opinion. What are your thoughts on the constitutionality of private school vouchers programs? Do you believe *Zellman* was correct to lay out strict requirements for such programs in order for them to pass constitutional muster?

Religious Discrimination

- 1) According to a 1996 memo during your time as associate White House counsel, you backed the right of a California landlord to deny an apartment to an unmarried couple on the grounds that sex outside of marriage violated the landlord’s religious beliefs. The California Supreme Court had ruled that the landlord’s actions violated statutes protecting would-be tenants from housing discrimination; you objected to that ruling, however, arguing that the landlord was protected by the Religious Freedom Restoration Act – legislation that was largely overturned a few years later by the U.S. Supreme Court. Can you elaborate on your views with respect to the balance between antidiscrimination and religious freedom? Under what legal and statutory standards would you make a determination as to whether one trumps the other? More broadly, can you provide your views overall on the separation of church and state?

First Amendment

- 1) As U.S. Solicitor General, you argued the government's position in *Citizens United v. Federal Election Commission*, in which the Supreme Court ruled (by a 5-4 decision) unconstitutional restrictions on corporate spending in elections previously enacted under the McCain-Feingold Act. During his announcement of your nomination to this seat, President Obama stated that your argument of the case illustrates "a great deal about [your] commitment to protect our fundamental rights, because in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens." Congress is currently considering a number of potential legislative remedies that would ameliorate the effects of this decision, a cause of action supported by the Obama administration. As a general principle, do you believe Congress would be right to take such action?