



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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We think the following ten questions will help Americans to understand Solicitor General Kagan's perspective on the significance of a fair and impartial judiciary. We encourage you to bring these pertinent issues to the public's attention by asking the following:

1. What conditions do you think characterize a fair and impartial judiciary? How important is such an institution to the functioning of our democracy? What principles guide you to fairly and impartially apply the law as a judge?
2. In your review of 1995 review of Stephen Carter's book on confirmation hearings, "Confirmation Messes, Old and New," you were critical of Senators' failure to ask, and of nominees' refusal to answer, questions about their views on specific, substantive issues. You indicated that nominees could and should be expected to answer questions about their views on "privacy rights, free speech, race and gender discrimination, and so forth." Do you still adhere to this view? If not, what has changed your perspective on this issue?

3. In *Caperton v. Massey*, the Court held that the Due Process Clause of the Fourteenth Amendment may require judges to recuse themselves in cases where they have received a significant amount of campaign support from a party in a pending case. Clearly you, as Solicitor General, would have to recuse yourself from any case in which you had participated, and, in your questionnaire, you indicated that you would "look to the letter and spirit" of the Code of Judicial Conduct for further guidance. Can you elaborate on this? What other sorts of circumstances may warrant a Justice's recusal in a particular case?
4. In a 2007 speech at West Point, you were highly critical of the views on executive power held by lawyers in the Bush administration. Yet as Solicitor General, you argued in favor of dismissing lawsuits on the basis of the state secrets privilege, argued against a ruling that granted habeas corpus rights to detainees in Afghanistan, and took an expansive view of the executive branch's authority to use military authority. Can you elaborate on your views on executive authority, and the role of the courts and congress in serving as a check on executive branch power?
5. In a 2003 speech at Princeton University, you spoke about judicial review, calling it on the one hand, necessary and desirable, and on the other, indicating that it should be used with caution, and with deference to the political process. Can you elaborate on this? What is the proper role of the courts in serving as a check on the other two branches of government?
6. President Obama has been outspokenly critical of the Supreme Court's opinion in *Citizens United*. And when President Obama nominated you to the Supreme Court, he stated, "last year, in the *Citizens United* case, she defended bipartisan campaign finance reform against special interests seeking to spend unlimited money to influence our elections." He went on to say that your work on that case, "says 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." Given your role in *Citizens United*, would you participate in future cases involving campaign finance reform?
7. In your confirmation hearing for your current position as Solicitor General you stated, in the context of questioning about your views on the Second Amendment, that "I understand the Solicitor General's obligations to include deep respect for Supreme Court precedents like *Heller* and for the principle of stare decisis generally." You also stated that "Only highly unusual circumstances can justify the Solicitor General's office in asking the Court to reconsider a decision, especially one as thoroughly considered as *Heller*." What is the difference between the deference a Solicitor General must give to Supreme Court precedent, and the deference that a Supreme Court Justice should give?
8. What criteria should the Congress use in applying its Constitutional power to impeach a federal judge? What norms should be used to balance the need for accountability with the need to insulate judges from improper political pressure?
9. During his confirmation hearing, Chief Justice John Roberts opined that "Judges are like umpires. Umpires don't make the rules; they apply them." Do you agree with this view? Why or why not?
10. If confirmed, you would be only the fourth ever female Justice on the Supreme Court, and, for the first time, three women would sit on the United States Supreme Court at the same time. Do you think that diversity on the bench is an important goal? Do you believe that having three women on the Supreme Court will help the progress of other women in the legal and judicial fields?

We would be glad to discuss these items with you or answer any questions you may have. You may reach Bert Brandenburg directly at 202-588-9436 or bbrandenburg@justiceatstake.org, and Deanna Dawson directly at 202-588-9434 or ddawson@justiceatstake.org.

Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
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June 22, 2010

The Honorable Herb Kohl
330 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

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3. In *Caperton v. Massey*, the Court held that the Due Process Clause of the Fourteenth Amendment may require judges to recuse themselves in cases where they have received a significant amount of campaign support from a party in a pending case. Clearly you, as Solicitor General, would have to recuse yourself from any case in which you had participated, and, in your questionnaire, you indicated that you would "look to the letter and spirit" of the Code of Judicial Conduct for further guidance. Can you elaborate on this? What other sorts of circumstances may warrant a Justice's recusal in a particular case?
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June 22, 2010

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein:

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June 22, 2010

The Honorable Russell Feingold
506 Hart Senate Office Building
Washington, DC 20510

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June 22, 2010

The Honorable Charles Schumer
313 Hart Senate Office Building
Washington, DC 20510

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Washington, DC 20510

Dear Senator Cardin:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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We think the following ten questions will help Americans to understand Solicitor General Kagan's perspective on the significance of a fair and impartial judiciary. We encourage you to bring these pertinent issues to the public's attention by asking the following:

1. What conditions do you think characterize a fair and impartial judiciary? How important is such an institution to the functioning of our democracy? What principles guide you to fairly and impartially apply the law as a judge?
2. In your review of 1995 review of Stephen Carter's book on confirmation hearings, "Confirmation Messes, Old and New," you were critical of Senators' failure to ask, and of nominees' refusal to answer, questions about their views on specific, substantive issues. You indicated that nominees could and should be expected to answer questions about their views on "privacy rights, free speech, race and gender discrimination, and so forth." Do you still adhere to this view? If not, what has changed your perspective on this issue?

3. In *Caperton v. Massey*, the Court held that the Due Process Clause of the Fourteenth Amendment may require judges to recuse themselves in cases where they have received a significant amount of campaign support from a party in a pending case. Clearly you, as Solicitor General, would have to recuse yourself from any case in which you had participated, and, in your questionnaire, you indicated that you would "look to the letter and spirit" of the Code of Judicial Conduct for further guidance. Can you elaborate on this? What other sorts of circumstances may warrant a Justice's recusal in a particular case?
4. In a 2007 speech at West Point, you were highly critical of the views on executive power held by lawyers in the Bush administration. Yet as Solicitor General, you argued in favor of dismissing lawsuits on the basis of the state secrets privilege, argued against a ruling that granted habeas corpus rights to detainees in Afghanistan, and took an expansive view of the executive branch's authority to use military authority. Can you elaborate on your views on executive authority, and the role of the courts and congress in serving as a check on executive branch power?
5. In a 2003 speech at Princeton University, you spoke about judicial review, calling it on the one hand, necessary and desirable, and on the other, indicating that it should be used with caution, and with deference to the political process. Can you elaborate on this? What is the proper role of the courts in serving as a check on the other two branches of government?
6. President Obama has been outspokenly critical of the Supreme Court's opinion in *Citizens United*. And when President Obama nominated you to the Supreme Court, he stated, "last year, in the *Citizens United* case, she defended bipartisan campaign finance reform against special interests seeking to spend unlimited money to influence our elections." He went on to say that your work on that case, "says 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." Given your role in *Citizens United*, would you participate in future cases involving campaign finance reform?
7. In your confirmation hearing for your current position as Solicitor General you stated, in the context of questioning about your views on the Second Amendment, that "I understand the Solicitor General's obligations to include deep respect for Supreme Court precedents like *Heller* and for the principle of stare decisis generally." You also stated that "Only highly unusual circumstances can justify the Solicitor General's office in asking the Court to reconsider a decision, especially one as thoroughly considered as *Heller*." What is the difference between the deference a Solicitor General must give to Supreme Court precedent, and the deference that a Supreme Court Justice should give?
8. What criteria should the Congress use in applying its Constitutional power to impeach a federal judge? What norms should be used to balance the need for accountability with the need to insulate judges from improper political pressure?
9. During his confirmation hearing, Chief Justice John Roberts opined that "Judges are like umpires. Umpires don't make the rules; they apply them." Do you agree with this view? Why or why not?
10. If confirmed, you would be only the fourth ever female Justice on the Supreme Court, and, for the first time, three women would sit on the United States Supreme Court at the same time. Do you think that diversity on the bench is an important goal? Do you believe that having three women on the Supreme Court will help the progress of other women in the legal and judicial fields?

We would be glad to discuss these items with you or answer any questions you may have. You may reach Bert Brandenburg directly at 202-588-9436 or bbrandenburg@justiceatstake.org, and Deanna Dawson directly at 202-588-9434 or ddawson@justiceatstake.org.

Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Sheldon Whitehouse
502 Hart Senate Office Building
Washington, DC 20510

Dear Senator Whitehouse:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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1. What conditions do you think characterize a fair and impartial judiciary? How important is such an institution to the functioning of our democracy? What principles guide you to fairly and impartially apply the law as a judge?
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3. In *Caperton v. Massey*, the Court held that the Due Process Clause of the Fourteenth Amendment may require judges to recuse themselves in cases where they have received a significant amount of campaign support from a party in a pending case. Clearly you, as Solicitor General, would have to recuse yourself from any case in which you had participated, and, in your questionnaire, you indicated that you would "look to the letter and spirit" of the Code of Judicial Conduct for further guidance. Can you elaborate on this? What other sorts of circumstances may warrant a Justice's recusal in a particular case?
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Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Amy Klobuchar
302 Hart Senate Office Building
Washington, DC 20510

Dear Senator Klobuchar:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Edward Kaufman
383 Russell Senate Office Building
Washington, DC 20510

Dear Senator Kaufman:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Al Franken
320 Hart Senate Office Building
Washington, DC 20510

Dear Senator Franken:

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Bert Brandenburg
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c a m p a i g n

June 22, 2010

The Honorable Jeff Sessions
335 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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We think the following ten questions will help Americans to understand Solicitor General Kagan's perspective on the significance of a fair and impartial judiciary. We encourage you to bring these pertinent issues to the public's attention by asking the following:

1. What conditions do you think characterize a fair and impartial judiciary? How important is such an institution to the functioning of our democracy? What principles guide you to fairly and impartially apply the law as a judge?
2. In your review of 1995 review of Stephen Carter's book on confirmation hearings, "Confirmation Messes, Old and New," you were critical of Senators' failure to ask, and of nominees' refusal to answer, questions about their views on specific, substantive issues. You indicated that nominees could and should be expected to answer questions about their views on "privacy rights, free speech, race and gender discrimination, and so forth." Do you still adhere to this view? If not, what has changed your perspective on this issue?

3. In *Caperton v. Massey*, the Court held that the Due Process Clause of the Fourteenth Amendment may require judges to recuse themselves in cases where they have received a significant amount of campaign support from a party in a pending case. Clearly you, as Solicitor General, would have to recuse yourself from any case in which you had participated, and, in your questionnaire, you indicated that you would "look to the letter and spirit" of the Code of Judicial Conduct for further guidance. Can you elaborate on this? What other sorts of circumstances may warrant a Justice's recusal in a particular case?
4. In a 2007 speech at West Point, you were highly critical of the views on executive power held by lawyers in the Bush administration. Yet as Solicitor General, you argued in favor of dismissing lawsuits on the basis of the state secrets privilege, argued against a ruling that granted habeas corpus rights to detainees in Afghanistan, and took an expansive view of the executive branch's authority to use military authority. Can you elaborate on your views on executive authority, and the role of the courts and congress in serving as a check on executive branch power?
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We would be glad to discuss these items with you or answer any questions you may have. You may reach Bert Brandenburg directly at 202-588-9436 or bbrandenburg@justiceatstake.org, and Deanna Dawson directly at 202-588-9434 or ddawson@justiceatstake.org.

Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Orrin Hatch
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

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Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Charles Grassley
135 Hart Senate Office Building
Washington, DC 20510

Dear Senator Grassley:

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Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake



Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Jon Kyl
730 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kyl:

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Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable Lindsey Graham
290 Russell Senate Office Building
Washington, DC 20510

Dear Senator Graham:

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Bert Brandenburg
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Justice at Stake

c a m p a i g n

June 22, 2010

The Honorable John Cornyn
517 Hart Senate Office Building
Washington, DC 20510

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June 22, 2010

The Honorable Tom Coburn
172 Russell Senate Office Building
Washington, DC 20510

Dear Senator Coburn:

As the U.S. Senate prepares to consider the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Justice at Stake is pleased to offer ideas for questions that could help illuminate the nominee's views on an increasingly important public policy issue – protecting the integrity of our courts from inappropriate political influence. We believe that this nomination offers a tremendous opportunity to educate Americans about the importance of a fair and impartial judiciary.

Justice at Stake is a national, nonpartisan partnership of more than 50 organizations working to keep courts fair and impartial through citizen education, civic engagement and reform. We have built a coalition to help Americans protect the courts that protect their rights, shield our courts and judges from excessive partisan pressure, and reduce the power of money and special interests over the judicial selection process. Justice at Stake does not endorse or oppose specific nominees or candidates. The positions and policies of Justice at Stake, and the questions submitted to Senators today, are its own, and do not necessarily reflect those of other campaign partners or board members.

We think the following ten questions will help Americans to understand Solicitor General Kagan's perspective on the significance of a fair and impartial judiciary. We encourage you to bring these pertinent issues to the public's attention by asking the following:

1. What conditions do you think characterize a fair and impartial judiciary? How important is such an institution to the functioning of our democracy? What principles guide you to fairly and impartially apply the law as a judge?
2. In your review of 1995 review of Stephen Carter's book on confirmation hearings, "Confirmation Messes, Old and New," you were critical of Senators' failure to ask, and of nominees' refusal to answer, questions about their views on specific, substantive issues. You indicated that nominees could and should be expected to answer questions about their views on "privacy rights, free speech, race and gender discrimination, and so forth." Do you still adhere to this view? If not, what has changed your perspective on this issue?

3. In *Caperton v. Massey*, the Court held that the Due Process Clause of the Fourteenth Amendment may require judges to recuse themselves in cases where they have received a significant amount of campaign support from a party in a pending case. Clearly you, as Solicitor General, would have to recuse yourself from any case in which you had participated, and, in your questionnaire, you indicated that you would "look to the letter and spirit" of the Code of Judicial Conduct for further guidance. Can you elaborate on this? What other sorts of circumstances may warrant a Justice's recusal in a particular case?
4. In a 2007 speech at West Point, you were highly critical of the views on executive power held by lawyers in the Bush administration. Yet as Solicitor General, you argued in favor of dismissing lawsuits on the basis of the state secrets privilege, argued against a ruling that granted habeas corpus rights to detainees in Afghanistan, and took an expansive view of the executive branch's authority to use military authority. Can you elaborate on your views on executive authority, and the role of the courts and congress in serving as a check on executive branch power?
5. In a 2003 speech at Princeton University, you spoke about judicial review, calling it on the one hand, necessary and desirable, and on the other, indicating that it should be used with caution, and with deference to the political process. Can you elaborate on this? What is the proper role of the courts in serving as a check on the other two branches of government?
6. President Obama has been outspokenly critical of the Supreme Court's opinion in *Citizens United*. And when President Obama nominated you to the Supreme Court, he stated, "last year, in the *Citizens United* case, she defended bipartisan campaign finance reform against special interests seeking to spend unlimited money to influence our elections." He went on to say that your work on that case, "says 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." Given your role in *Citizens United*, would you participate in future cases involving campaign finance reform?
7. In your confirmation hearing for your current position as Solicitor General you stated, in the context of questioning about your views on the Second Amendment, that "I understand the Solicitor General's obligations to include deep respect for Supreme Court precedents like *Heller* and for the principle of stare decisis generally." You also stated that "Only highly unusual circumstances can justify the Solicitor General's office in asking the Court to reconsider a decision, especially one as thoroughly considered as *Heller*." What is the difference between the deference a Solicitor General must give to Supreme Court precedent, and the deference that a Supreme Court Justice should give?
8. What criteria should the Congress use in applying its Constitutional power to impeach a federal judge? What norms should be used to balance the need for accountability with the need to insulate judges from improper political pressure?
9. During his confirmation hearing, Chief Justice John Roberts opined that "Judges are like umpires. Umpires don't make the rules; they apply them." Do you agree with this view? Why or why not?
10. If confirmed, you would be only the fourth ever female Justice on the Supreme Court, and, for the first time, three women would sit on the United States Supreme Court at the same time. Do you think that diversity on the bench is an important goal? Do you believe that having three women on the Supreme Court will help the progress of other women in the legal and judicial fields?

We would be glad to discuss these items with you or answer any questions you may have. You may reach Bert Brandenburg directly at 202-588-9436 or bbrandenburg@justiceatstake.org, and Deanna Dawson directly at 202-588-9434 or ddawson@justiceatstake.org.

Sincerely,

Bert Brandenburg
Executive Director
Justice at Stake

Deanna Dawson
Director of Federal Affairs
Justice at Stake