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Reply to: Washington, D.C.

June 25, 2010

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Ranking Member Sessions,

Liberty Counsel is a nonprofit litigation, education, and policy organization with offices in Florida, Virginia, and Washington, DC, and hundreds of affiliate attorneys across the nation. As an organization that defends the Constitution, Liberty Counsel represents the concerns of hundreds of thousands of our members and supporters who are alarmed about increasing political activism in the judicial branch.

As you know, President Barack Obama recently nominated Elena Kagan for a position on the Supreme Court. The Senate Judiciary Committee hearing on her nomination is scheduled to begin June 28, 2010. As you prepare to engage in these proceedings, Liberty Counsel encourages you to consider Kagan's inexperience, ideology, and judicial philosophy. Liberty Counsel is certain that after doing so, you will agree that, like Harriet Miers, Kagan is not qualified for a position on the High Court.

Although we understand that it is not necessary for a United States Supreme Court Justice to have served on the bench of a lower court, it is very important for her to be conversant with legal practice. Kagan has only three years of practice experience, two of those serving only as a junior attorney. Most of her experience has involved work in partisan politics and academia.

Because of Kagan's role in advocating for partisan positions, we are concerned that she lacks the ability to interpret the law without invoking her own personal experiences and prejudices.

She banned the military from Harvard's campus because the military would not accept members who openly engaged in homosexual conduct;¹ she encouraged President Clinton to sign cloning laws, providing that the cloned embryo was killed prior to live birth;² she stated that a ban on assisted suicide was a terrible idea;³ she expressed an affinity for socialism in her senior thesis;⁴ and she expressed hostility towards faith-based organizations and protectors of innocent human life.⁵

It is because of these hostilities and prejudices that Liberty Counsel is also concerned about Kagan's judicial philosophy. The Constitution is the foundation of this nation. In order to maintain a just and orderly society, Supreme Court Justices must strictly interpret the Constitution. Kagan has consistently demonstrated an admiration, not for the strict interpretation of the Constitution, but for judicial activism and those who engage in activism.

Kagan demonstrated her activist philosophy when she argued before the Court in *Citizens United v. Federal Election Commission*, where she attempted to convince the Justices to undercut previous decisions by applying unrelated case precedent, causing Chief Justice Roberts and Justice Kennedy to question her on the subject during oral argument.⁶ Additionally, while Dean at Harvard Law School, Kagan removed Constitutional Law from the list of required courses and replaced it with International Law, embracing what Harvard deemed the "transnational nature" of law.⁷ Kagan even stated that foreign law could be used to interpret the laws of the United States of America.⁸

Kagan's philosophy is not only apparent based on what she has said but also based on whom she admires. Her hero is Aharon Barak, an Israeli justice who claimed that a judge can

¹ Written Questions for Chairman Patrick Leahy For Elena Kagan: Nominee to be Solicitor General of the United States, Submitted February 10, 2009 at 9, *available at*

<http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf> (last visited June 25, 2010; *see also*, Frank J. Gaffney, Jr., *Kagan: Shill for Shariah?*, Big Government, May 19, 2010.

² Steven Ertelt, *Kagan Files from Clinton Administration Show Her Backing Human Cloning*, LifeNews.com, June 10, 2010, <http://www.lifenews.com/bio3114.html> 2010.

³ The Associated Press, *Kagan Called Assisted Suicide Ban "Terrible Idea,"* ABCNews, June 4, 2010, <http://abcnews.go.com/Politics/wireStory?id=10829103>.

⁴ Mike Allen and Josh Gerstein, *White House to Release Kagan Theses*, Politico, May 17, 2010, <http://www.politico.com/news/stories/0510/37343.html#ixzz0oUA32ctP>.

⁵ Elena Kagan, *Nov. 10, 1980: Fear and Loathing in Brooklyn*, The Princetonian, Nov. 10, 1980, <http://www.dailyprincetonian.com/2010/05/03/26082/>.

⁶ Transcript of Oral Argument at 64, *Citizens United*, 556 U.S. __ (no. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf (last visited June 25, 2010).

⁷ Jeri Zeder, *At Home in the World*, Harvard Law Bulletin, *available at* http://www.law.harvard.edu/news/bulletin/2008/winter/feature_3.php (last visited June 25, 2010).

⁸ Written Questions for Chariman Patrick Leahy For Elena Kagan: Nominee to be Solicitor General of the United States, Submitted February 10, 2009 at 4, *available at* <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf> (last visited June 25, 2010).

“give a statute a new meaning.”⁹ Kagan also clerked for and greatly admired Justice Thurgood Marshall, for whom she wrote a law review article in which she agreed with his statements that the Constitution was “defective” and contained “outdated notions” as originally drafted.¹⁰ It is our fear that Kagan will continue her liberal heroes’ crusade of judicial activism, in part because she has indicated a propensity to do so by stating that “... judges will have opinions, prejudices, [and] values. Perhaps most important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not wrong or invalid. The law, after all, is a human instrument – an instrument designed to meet men’s needs.”¹¹

We disagree with Kagan. It is not the role of the Court to mold and steer the law; that is the role of the legislative branch. It is the role of the Court to interpret the laws that the legislature creates, in accordance with the Constitution.

In Federalist Number 76, Alexander Hamilton stated that it is the purpose of the Senate to ensure a person is not esteemed to the highest court in the land when she has “no other merit than that of coming from the same State to which [the President] particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”¹²

A vote to confirm a Supreme Court nominee is one of the most important and lasting votes a senator can make. Likewise, to prevent an individual like Elena Kagan from legislating from the bench is a key purpose of the “advice and consent” process and the duty of the Senate Judiciary Committee. As the Committee considers Kagan’s inexperience, ideology, and judicial philosophy, we urge you to consider not only Kagan’s responses to the Committee’s questions during the hearing, but also her history. It has become apparent that confirmation conversions to originalist perspectives are not lasting.

Respectfully,



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Liberty Counsel
Dean and Professor of Law,
Liberty University School of Law

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⁹ *Solicitor General Elena Kagan’s Judicial Hero*, Americans United for Life, May 12, 2010, <http://catholicexchange.com/2010/05/12/130230/>

¹⁰ Elena Kagan, *For Justice Marshall*, 71 Tex. L. Rev. 1125, 1125 (1993).

¹¹ Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, p. 120 (April 20, 1983) (unpublished M.P.P. thesis, Oxford University) (http://www.fed-soc.org/docLib/20100518_OxfordThesis.pdf).

¹² Alexander Hamilton, Federalist No. 76: The Appointing Power of the Executive.