

SCOTUSblog Briefing Paper

Elena Kagan – Abortion

June 12, 2010

I. Summary and Our Take

Abortion is always often a contentious issue in Supreme Court confirmation hearings because the issue ignites strong passions.

The Court itself is narrowly divided on abortion questions; as a result, the shift of a single vote theoretically can make a material difference in the government's regulatory power. There likely are five votes on the Court to narrow the abortion right under existing precedent, but there almost certainly are not five votes to overrule *Roe v. Wade*. It is exceptionally unlikely, however, that a Democratic appointee would provide a missing vote to narrow or eliminate the abortion right.

Elena Kagan's record on abortion is thin. She has never publicly written or spoken about her own views on the question – whether as a constitutional or ethical matter. She has never given any indication that she regards abortion as an issue in which she is personally invested.

As a student at Princeton, she wrote an essay dismissively referring to conservatives as, *inter alia*, “these avengers of ‘innocent life.’” This language – isolated as it is in her career – strikes us as the brief moralizing of a college student, rather than reflecting any genuine hostility to pro-life organizations.

As a law clerk, she wrote one memorandum to Justice Marshall indicating her view that prisoners did not have a constitutional right to state-funded abortions. The memo certainly does not take a stridently pro-choice position. But that was decades ago, and in her role as a law clerk.

In the Clinton Administration, she urged the President to support a compromise on legislation that would have restricted so-called partial-birth abortions, but which would have included an exception for the health of the mother; such a position, she reasoned in part, would justify a veto of a broader ban on late-term abortions. But the memo was written in her capacity as a domestic policy advisor to the President, charged with advancing the agenda of the Clinton Administration. (The President did ultimately veto the bill; a similar measure was signed into law six years later by President George W. Bush and subsequently upheld by the Supreme Court, in a decision that as a practical matter overturned a prior ruling, invalidating a similar state restriction, issued while Sandra Day O'Connor was still on the Court.)

To the extent that these few documents reflect Kagan's own views, they indicate a pragmatic, centrist pro-choice perspective – both positions would have been shared by Republican appointee Sandra Day O'Connor, for example. But we caution that there is no substantial reason to believe that either writing reflects Kagan's views on the scope of the right to an abortion under the Constitution.

Generally speaking, we anticipate from our broad sense of Kagan's ideology that she will support existing law relating to abortion and will be opposed to further efforts to narrow *Roe*. But she will not be a strong advocate for expanding the abortion right.

II. The Relevant Source Materials

A. [Memorandum by Law Clerk Elena Kagan for Justice Thurgood Marshall](#) (1987) re *Lanzaro v. Monmouth County Correctional Institutional Inmates* (concerning “the rights of women prisoners to have abortions that are not medically necessary”)

- “The DC [district court] granted rspts’ [the inmates’] motion for a preliminary injunction, and the CA [court of appeals] affirmed most of the DC’s order. The CA held that rspts had shown a probability of success in their litigation because the county regulations regarding abortion interfered with the inmates’ constitutional rights and had no legitimate penological justification. The CA stated that petr [the government] must take further steps to accommodate the reproductive rights of petr. In addition, and independent of the above analysis, the CA held that the denial of elective abortions to inmates constitutes a breach of the duty to attend to inmates’ medical needs and therefore contravenes the Eighth Amendment. In this part of the analysis, the CA strongly suggested that the county must assume the cost of providing inmates with elective abortions in order to comply with the Eighth Amendment. Quite honestly, I think that although all of this decision is well-intentioned, parts of it are ludicrous. Since elective abortions are not medically necessary, I cannot see how denial of such abortions is a breach of the Eighth Amendment obligation to provide prisoners with medical care. And given that non-prisoners have no rights to funding of abortions, I do not see why prisoners should have such rights. ... Judge Higginbotham simply went too far; this case is likely to become the vehicle that this Court uses to create some very bad law on abortion and/or prisoners rights.”

B. April 10, 1997 Memorandum for the President from Elena Kagan, John Hilley, and Tracey Thornton (in “[Abortion Partial Birth – Notes and Memos](#)” PDF page 9) re: Alternatives to Partial-Birth Abortion

- “You have asked whether the so-called partial-birth procedure is ever necessary to save the life of a woman or avert serious harm to her health. Considerable medical uncertainty surrounds this question. The doctors of the women you met with believed the procedure was necessary to prevent serious injury, and other doctors have said that the procedure, in certain circumstances, is or may be the safest one to use. Still other doctors have disputed that health considerations ever demand use of the procedure.”
- “Given the state of medical evidence on this subject, an exception for women who need the procedure to prevent serious harm is appropriate. Such an exception would enable the attending doctor -- the person with the most relevant knowledge -- to make the complex decision whether the procedure is in fact medically necessary in a given set of circumstances. The uncertainties surrounding this issue, however, caution against your making any estimates of the number of women whose health, without this procedure, would be at risk of serious harm. Any such estimates, however large or small, would be difficult to support.”
- “[T]he ultimate success of Daschle’s effort either in passing or getting veto override strength depends a great deal on the rhetorical battle that will become much more intense as this bill goes to the floor. ... [T]he proponents’ argument that the recent exposure of the “lies” told by the pro-choice lobby should cause Senators to reevaluate their position is being countered by the Daschle camp with the fact that, unlike the Daschle alternative [banning all abortions of viable fetuses except when the physical health of the mother was at risk], the Republican bill would not stop a single abortion; it would merely result in abortion by other methods all of which pose a greater risk to the woman’s health. By contrast, the alternative would outlaw these late-term abortions entirely no matter what the method and thereby actually reduce the number of abortions in this country without putting women at unacceptable risk. Finally, the Daschle approach permits the argument that even if Congress overrides your veto, the Republican bill will be struck down

because its pre-viability restrictions significantly intrude upon the essential holding of the *Roe v. Wade* decision. Enactment of the Daschle alternative allows Congress to pass a comprehensive, constitutional ban to stop unnecessary abortions of viable fetuses and is a ban that you would sign.”

- Handwritten note from President Clinton at top of memo: “Any possibility we can get any Catholics to support the Daschle bill in its [illegible] for us? Worth pointing out it would reduce abortions including partial birth abortions.”
- C. [May 13, 1997 Memorandum for the President](#) from Elena Kagan and Bruce Reed:
- “[T]he Senate is taking up the Partial Birth Abortion Act (HR 1122) this afternoon. We expect Senator Daschle and Senator Feinstein to offer substitute amendments during the course of the debate. We recommend that you send a letter to Congress indicating that you would accept either of these substitute proposals.”
 - “The American College of Obstetricians and Gynecologists today endorsed the Daschle amendment, stating that it ‘provides a meaningful ban [on post-viability abortions] while assuring women’s health is protected.’ . . . The AMA has refused to take a position on any of the pending legislative proposals, but yesterday issued a study (1) expressing skepticism about the need to use the ‘partial birth’ procedure, but stating that doctors must retain discretion to use medical judgment in selecting procedures, and (2) stating that post-viability abortions are almost never necessary to save a woman’s life or prevent serious harm to her health, given the alternative at this stage of delivering the fetus.”
 - “The [pro-]choice groups...oppose the Daschle proposal. They argue that the stringency of Daschle’s health exception – including its limitation to cases of physical harm – undermines the comprehensive protections announced in Roe regarding the health of the woman. The Office of Legal Counsel of the Justice Department similarly believes that both the Daschle and the Feinstein amendments, properly read, violate Roe because they countenance tradeoffs involving women’s health.”
 - “We recommend that you endorse the Daschle amendment [banning all abortions of viable fetuses except when the physical health of the mother was at risk] in order to sustain your credibility on HR 1122 [a stricter Republican ban] and prevent Congress from overriding your veto.”
 - “Especially given ACOG’s endorsement of the Daschle amendment, it will be difficult for you to make the case that Daschle’s language does not adequately safeguard women’s health. In these circumstances, declining to support the amendment will weaken your position and increase the chance that Congress will override your veto.”
 - NOTE: A separate PDF version of this memo (available [here](#) at PDF page 6) includes a handwritten note from President Clinton, who writes “I fully agree – no one can seriously say D. wouldn’t stop far more abortions w/ less human damage – let’s do it NOW.”
- D. [H.R. 1122](#) (Partial-Birth Abortion Ban Act of 1997) [Vetoed by President Clinton]
- “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both.”
- E. [Amendment No. 289](#) (Proposed amendment to H.R. 1122, also referred to as the “Daschle Amendment”)

F. [June 16, 1998 Memo to the President on Medicare Coverage of Abortions](#) (Kagan was one of the advisors contributing to the memo)

- “All of your advisers agree (i) that we should offer the [Catholic Health Association] a new administrative option that lets Catholic plans participate in Medicare without covering abortions; and (ii) that we should broaden the 1991 [Health Care Financing Administration] directive to track [the Hyde Amendment, which states that Medicare covers abortions only where the mother’s life is endangered] and permit funding in case of rape/incest.”

G. [Abortion Partial Birth – Notes and Memos](#) (from Clinton Library)

- In a memo from Rahm Emanuel to Kagan and others on a poll concerning abortion procedures, the following text is flagged in the margins:
 - “[T]here is a surprising opportunity here to turn the tables on the other side by going on the offensive and aggressively attacking their position - specifically, their opposition to any exception to the partial birth abortion ban for cases involving serious harm to the woman's health - as being extreme.” (PDF page 3)
 - The political motivations of the authors of this extreme version of the partial birth abortion ban can be attacked with great credibility. By 59% to 19%, voters say that politicians who are trying to impose more restrictions on abortion are mainly concerned with gaining support for powerful conservative religious groups, rather than with protecting unborn life.” (PDF page 5)

H. [Daily Princetonian Essay re: Ronald Reagan’s victories](#)

- “Even after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents,” Kagan wrote, “ ... these avengers of ‘innocent life’ and the B-1 bomber, these beneficiaries of a general turn to the right and a profound disorganization on the left.”

III. Statements by Supporters and Opponents

A. Opponents and Pro-Life Groups:

- Douglas Johnson, Legislative Director for the National Right to Life Committee ([full statement](#)):
 - “President Obama used thinly veiled code language to communicate his clear intent to choose a nominee who would be hostile to legislative attempts to protect unborn humans.”
 - “[S]enators have an obligation to probe whether Elena Kagan will tolerate limits on abortion, enacted through normal democratic channels, or will seek to impose extreme pro-abortion views by judicial decree.”
 - “If the dissenters’ position [in *Gonzales v. Carhart*, which upheld a ban on partial-birth abortions] became the position of the majority of the Supreme Court, various types of laws that have been deemed permissible under *Roe v. Wade* could be invalidated by judicial decree, perhaps including the Hyde Amendment (restricting government funding of abortion) and parental notification laws.”
 - “Regarding Ms. Kagan's specific views on the Court's past abortion-related rulings, there is little on the public record. But Ms. Kagan may have betrayed a

possible personal animus towards the pro-life movement in a 1980 essay lamenting Republican gains in the 1980 election, in which she referred disparagingly to ‘victories of these anonymous but Moral Majority-backed [candidates] . . . these avengers of ”innocent life” and the B-1 Bomber . . .’ Was Ms. Kagan so dismissive of the belief that unborn children are members of the human family that she felt it necessary to put the term ‘innocent life’ in quote marks, or does she have another explanation? Would she be able to set aside any animus she has towards those who fight to protect innocent human life, when reviewing laws duly enacted for that purpose?”

- Judie Brown, President of the American Life League ([full statement](#)):
 - “[T]he 51 percent of Americans who self-identify as ‘pro-life’ are demanding answers to Supreme Court nominee Elena Kagan’s rabidly pro-abortion and anti-marriage record.”
 - “Clearly, Kagan has demonstrated a record of interpreting the law in the light of homosexual, pro-abortion activism.”
- Lifenews.com ([full article](#)):
 - “The take from the stories [on the memo] is that Kagan’s rock solid pro-abortion views aren’t that strong. Nothing could be further from the truth.”
- Americans United for Life President Charmaine Yoest (via [Lifenews.com](#)):
 - “Elena Kagan has strong ties to abortion-advocacy organizations and expressed admiration for activist judges who have worked to advance social policy rather than to impartially interpret the law.”
 - [Yoest said her group would] “oppose President Obama’s attempt to reshape the Court as an activist, pro-abortion institution through which unelected judges will work to impose an out-of-the-mainstream social agenda upon the American people.”
- Wendy Wright, President of Concerned Women for America (via [Lifenews.com](#)):
 - “The Clinton Administration treated pro-life activists like violent criminals, creating a task force in the Department of Justice and a grand jury to investigate peaceful pro-lifers. This raises serious concerns that she shares the hostile view that religious beliefs are a form of ‘hate.’”
- Susan B. Anthony List:
 - [Statement on Nomination](#):
 - “Elena Kagan has no judicial record from which to determine her position on Roe v. Wade, but she has publicly criticized the 1991 Supreme Court ruling to allow the Department of Health and Human Services to restrict funding from groups that performed or promoted abortion, and has also criticized crisis pregnancy centers. Additionally, President Obama has said he prefers a Supreme Court nominee who would take a special interest in ‘women’s rights’—a barely masked euphemism for abortion rights. Through the judicial confirmation process the American people must know where Elena Kagan stands on the abortion issue, and it is the responsibility of the U.S. Senate to find out.”
 - “Ms. Kagan’s publicly demonstrated prejudices do not lend themselves well to blind justice. Susan B. Anthony and her early feminist compatriots fought for a human rights standard sustained only through

blind justice—and they knew that one group is never served by undermining the rights of another. Women will never be served by ignoring the rights of unborn children. When evidence of personal preference appears in any Supreme Court nominee’s judgment, it should give all women pause.”

- Susan B. Anthony List President Marjorie Dannenfelser (via Lifenews.com):
 - “In the past Kagan has been a strong supporter of the pro-abortion agenda. She has vigorously opposed the de-funding of taxpayer-funded clinics which promote abortions, despite the fact that a majority of Americans do not want their tax dollars to fund abortion providers.”
- Americans United for Life issue brief, [“Legal Analysis of Kagan Appointment”](#):
 - “Kagan has publicly and repeatedly criticized *Rust v. Sullivan*, 500 U.S. 173 (1991), a Supreme Court decision which upheld regulations that ensured Americans’ tax dollars did not support programs that promote or counsel for abortion. Despite the fact that the majority of Americans do not want their tax dollars to fund abortion providers, Kagan objected to this Supreme Court decision and even argued that the regulations amounted to the subsidization of ‘anti-abortion’ speech.”
 - “Kagan is dismissive of the harmful effects abortion has on women’s physical, emotional, and psychological health, calling them ‘widely contested.’ See Kagan, Elena, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. Chi. L. Rev. 873 (1993).”
- Americans United for Life issue brief: [“AUL Kagan File – The Abortion Connection Memo”](#)
 - “Kagan has contributed financially to the National Partnership for Women and Families (NPWF), an organization whose goal, in its own words, is ‘to increase women’s access to...reproductive health services and block attempts to limit reproductive rights...and to give every woman access to...abortion services....’”
 - “The role of a Supreme Court Justice is not to usurp the role of legislatures and force upon the American people the Justice’s views on social justice and reproductive rights. When a Justice begins to rule based on her own beliefs or those of a particular group, she fails in her duty to uphold the fundamental Constitutional principle of equal justice for all ... If Kagan is confirmed, the American people will continue to have a pro-abortion ideology imposed upon them by a life-time-appointed Justice.”
- Americans United for Life issue brief: [“The Abortion Funding Memo”](#)
 - “Elena Kagan has argued that the use of government funds to promote life over abortion is unconstitutional. However, the role of the government is to make these choices in a Democracy. The Supreme Court has repeatedly affirmed Congress’ determination that the state has an interest in protecting unborn life. Kagan’s disagreement shows how far outside of the mainstream her views are.”
- Americans United for Life issue brief: [“The Pro-Abortion Politicians Memo”](#)
 - “Kagan has worked for, and is close friends with, two of the most pro-abortion presidents in American history, as well as other pro-abortion politicians. As Senator Boxer stated, we *do* have every reason to believe Kagan will bring the same radical pro-abortion worldview to the Supreme Court.”
- Americans United for Life issue brief: [“The Partial Birth Abortion Ban Memo”](#)

- “Elena Kagan’s advice to President Clinton serves as a warning for the vast majority of Americans who oppose expansion of abortion. Her memo suggests that in her opinion even phony compromise legislation which purports to regulate abortion is unconstitutional. Moreover, her advice to President Clinton that he should support what she believed to be unconstitutional language raises serious questions about her commitment to upholding the Constitution.”
- Americans United for Life issue brief, “[The Abortion Record Memo](#)”:
 - “Members of the Senate Judiciary Committee should extensively question Kagan about her financial support of a pro-abortion organization, lifetime service of pro-abortion policy makers, troubling admiration for judicial activists, hostile views towards commonsense regulations of abortion, and her disapproval of federal funding for programs that help pregnant women simply because the recipients of federal funds are religious organizations. All of these raise serious concerns about Kagan’s judicial philosophy and whether she will respect Court holdings that contradict her views.”

B. Supporters and Pro-Choice Groups:

- Josh Earnest, speaking on behalf of the White House: “As a White House aide, Elena Kagan provided legal advice and evaluated policy proposals for President Clinton, who like President Obama supported a late-term abortion ban with a narrow exception for the health of the woman.”
- Emily Bazelon, in Slate’s XX Factor blog ([full article](#)):
 - “I’ve been getting e-mails from feminist friends wondering how worried they should be. Not that much, I think ... “
 - “At the time, Clinton had vetoed one bill that would have banned so-called partial-birth abortion with an exception only for the life of the mother. The president went on to veto a second such bill, sponsored by then-Sen. Rick Santorum. The right fielded these bills, of course, to focus the conversation about abortion on gruesome-sounding late-term procedures—even though 90 percent of abortions take place in the first trimester, then and now, and only a small number take place after 22 weeks. Daschle was trying to take partial-birth abortion off the table. His proposal actually would have banned more abortions than Santorum’s. The ACLU opposed it. But Santorum did too, calling the bill a sham, according to the *Chicago Tribune*.”
- Nancy Keenan, President of NARAL Pro-Choice America ([full statement](#)):
 - “President Obama has selected a nominee with a sound record of legal accomplishment. We call on the Senate to give Solicitor General Kagan a fair hearing and look forward to learning more about her views on the right to privacy and the landmark *Roe v. Wade* decision. President Obama recently reiterated his strong support for constitutional principles that protect women’s rights. We will work to ensure Americans receive clear answers to questions regarding these principles as this nomination process moves forward.”
- Cecile Richards, President of Planned Parenthood Federation of America ([full statement](#)):

- “It is clear that Americans want a Supreme Court justice who has a deep understanding of the law, an appreciation of the impact of the court's decisions on everyday Americans, and a commitment to the rule of law and protecting our individual liberties. We are confident that Kagan will bring the dedication and commitment that have marked her career with her to the highest court in the land.”
- Nancy Northup, President of the Center for Reproductive Rights ([full statement](#)):
 - “The Center for Reproductive Rights looks forward to learning more about Solicitor General Kagan's opinions on important constitutional principles and cases, particularly the right to privacy and *Roe v. Wade*. We applaud her groundbreaking career history as the first female dean of Harvard Law School and first woman to serve as U.S. Solicitor General. However, her public record reveals very little about her judicial philosophy or her views on the constitutional protections in *Roe*.”
 - “The last Supreme Court decision on abortion was 5 to 4 and further diluted constitutional protections for abortion. As such, it is absolutely critical that the Senate Judiciary Committee conduct a rigorous confirmation process and thoroughly explore Ms. Kagan's views on the constitutional protection that should be afforded to women seeking abortions. Failure to pursue such questions creates dangerous uncertainty regarding a constitutional right that has already been significantly weakened.”
- Stephanie Schriock, President of EMILY's List ([full statement](#)):
 - “I commend President Obama's nomination of Solicitor General Elena Kagan to the Supreme Court of the United States ... With Elena Kagan, President Obama has selected a strong, independent and intelligent woman for the bench. Her experience and background as Solicitor General and Dean of Harvard Law School will add balance to the court. If confirmed by the Senate, Elena Kagan would serve as the fourth woman ever to sit on the court, and the Supreme Court would have a record three women on the bench. With her nomination the court is one step closer to reflecting the diversity that makes our country so great.”
- Rep. Louise Slaughter (in a letter to Patrick Leahy, via [The Hill](#)):
 - “The emergence of a memorandum co-authored by Solicitor General Kagan during her time as a White House aide in the Clinton Administration regarding abortion is troubling.”
 - “As Co Chair of the Pro Choice Caucus, I urge you and the Committee to keep the constitutional right to choose at the forefront of your minds as you question Solicitor General Kagan.”

IV. News Sources

- Huffington Post, [Elena Kagan Urged Bill Clinton to Ban Late-Term Abortions in 1997](#) (May 10, 2010)
- WSJ Law Blog, [Elena Kagan and the Partial-Birth Abortion Memo](#) (May 11, 2010)
- ABC News, [Elena Kagan Abortion Memo Offers New Look at Nominee](#) (May 11, 2010)

- New York Times, [*As Clinton Aide, Kagan Recommended Tactical Support for an Abortion Ban*](#) (May 11, 2010)
- Medical News Today, [*Kagan Co-Authored Clinton White House Policy Memo Supporting Compromise on “Partial-Birth” Abortion Ban*](#) (May 12, 2010)
- Slate XX Factor, [*Kagan and Late-Term Abortions*](#) (May 11, 2010)
- Politico, [*Memos Reveal Elena Kagan’s Centrist Side*](#) (May 12, 2010)
- Washington Post, [*Abortion Could Be Sleeper Issue in Supreme Court Confirmation Process*](#) (May 11, 2010)
- NPR, [*Kagan’s Positions on Hot-Button Issues In Spotlight*](#) (May 11, 2010)
- National Review Online, [*Kagan on Partial-Birth Abortion*](#) (May 11, 2010)
- FoxNews, [*Kagan Nomination Sparks Speculation Over Her Abortion Views*](#) (May 12, 2010)
- Newsweek, [*Context Matters*](#) (May 13, 2010)
- Los Angeles Times, [*Kagan’s Abortion Stance Has Both Sides Guessing*](#) (May 15, 2010)