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QUESTIONS FOR THE CONFIRMATION HEARINGS OF U.S. SUPREME COURT NOMINEE ELENA KAGAN SUBMITTED BY THE SOCIETY OF AMERICAN LAW TEACHERS--SALT

June 28, 2010

Introduction: Since 1974, the Society of American Law Teachers (“SALT”) has been an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-represented individuals and communities.

As law professors, we understand the enormous and lasting influence a Supreme Court justice will have on the interpretation of law. In choosing the cases to be heard by the Supreme Court and in its decisions, the Court mediates the balance of power among the three branches of the federal government; defines the relationship between the federal government and the various states and municipalities; resolves the tension between liberty and equality, the individual, the corporation, and the state; and gives meaning to statutes, treaties, and the Constitution.

On Monday, June 28th, the confirmation hearings of Elena Kagan will begin before the Senate Judiciary Committee. SALT hopes that these hearings afford an opportunity for the nominee, Solicitor General of the United States Elena Kagan, to clarify her positions on several issues of importance to SALT and its members as well as to the public: executive power, national security, the Solomon Amendment, and diversity.

We submit the following questions to the Senate Judiciary Committee to help guide the inquiry into the nominee’s qualifications to serve.

Executive Power and National Security

1. What is the proper role for the courts in reviewing the actions of the President during wartime? Are there any actions the President can take for national security reasons that you think are unreviewable?

2. What are your views with respect to the well-known Bush Administration theory (promoted by John Yoo, among others) that the President may disregard Acts of Congress in such matters as torture, wiretapping, and other claimed exercises of presidential power?

3. You wrote in a 2001 law review article, "I suggest . . . that most statutes granting discretion to executive branch – but not independent – agency officials should be read as leaving ultimate decisionmaking in the hands of the President." The Reagan Administration sought to supervise agencies from the White House to advance its anti-regulatory agenda, and the Clinton Administration sought to do the same from a pro-regulation prospective. At the suggestion of John Yoo, the Bush Administration propounded the doctrine of the unitary executive in a broad range of situations. Your Deputy Solicitor General Neal Katyal wrote in a 2006 Yale Law Journal article that you are a unitary executive. Is that a fair characterization of your position?

4. Does the Supreme Court have the last word on what the law is, as the Court said in Cooper v. Aaron and United States v. Nixon, or does the President have equal power to determine the constitutionality of his own actions and Congressional legislation? If the Supreme Court had held that President Bush's warrantless electronic surveillance program was unconstitutional, do you think the President had the right to continue, or should have continued, the program if he thought it was constitutional?

5. In Boumediene v. Bush, the Supreme Court held that the detainees at Guantánamo have a constitutional right to access to U.S. courts to hear their habeas corpus petitions. Writing for the majority, Justice Kennedy reiterated the Court's finding in Rasul v. Bush that although Cuba retains technical sovereignty over Guantánamo, the United States exercises complete jurisdiction and control over its naval base, and thus the Constitution protects the detainees there. Justice Kennedy rejected "the necessary implication" of President Bush's position that the political branches could "govern without legal restraint" by locating a U.S. military base in a country that retained formal sovereignty over the area. "Even when the United States acts outside its borders," Justice Kennedy wrote, "its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" What is your view of the rights of Guantánamo detainees to have their claims heard in United States courts?

6. During your tenure as Solicitor General, you argued that U.S. federal courts do not have jurisdiction to release detainees at Bagram air base in Afghanistan on habeas corpus petitions. Since the United States exercises control over Bagram, why wouldn't the Court's reasoning in Boumediene apply to the detainees there as well as detainees at Guantánamo?

7. During your tenure as Solicitor General, the Obama Administration routinely invoked the state secrets privilege, notably to prevent the courts from considering the legality of the NSA's surveillance program and the extraordinary rendition program. In Mohawk Industries v. Carpenter, you argued in an amicus curiae brief the novel concept that the state secrets privilege is a constitutional doctrine even though the Supreme Court has never found a basis for the privilege in the Constitution. From where in the Constitution do you believe the state

secrets privilege emanates? What is your understanding of the source and extent of the state secrets privilege?

8. In Kiyemba v. Obama, you argued against the release of 17 Uighurs being held at Guantánamo into the United States even though a lower federal court found them to be innocent of any terrorism-related crimes. Once again, you advocated an expansive view of executive power, that since the power to admit or exclude aliens is a sovereign function of the political branches, the courts had no power to review those decisions. Can you explain the relationship between fundamental constitutional rights of criminal defendants and military justice?

9. During your solicitor general confirmation hearing, you agreed with Senator Lindsey Graham that the entire world is a “battlefield,” that “war” is the proper legal framework for analyzing all matters related to terrorism, and that the government can thus indefinitely detain anyone captured on the “battlefield” (that is, anywhere in the world without geographical limits) who is accused but not proven to be an “enemy combatant.” What role should the Court play, if any, in providing definiteness to such an undefined war—without a clear enemy or a clear beginning or end? What is the legal basis of the category “enemy combatant”?

10. What are your views on the Supremacy Clause of the Constitution with regard to U.S.-ratified treaties? Should courts be able to declare treaties to be non-self-executing? Under what circumstances and under what authority?

11. How should the Court resolve violations to human rights and humanitarian treaties that the United States has ratified, such as the International Covenant on Civil and Political Rights (ICCPR) and the Covenant Against Torture and Other Cruel or Degrading Treatment or Punishment, which prohibit torture and arbitrary detention?

12. How do you rate the performance of the federal courts in protecting constitutional democracy during the Bush years?

13. In United States v. Nixon, by rejecting Nixon’s claim of executive privilege and ordering him to produce the Watergate tapes, the Supreme Court established that no one, not even the President, is above the law. In Mitchell v. Forsythe, the Supreme Court held that the Attorney General was not entitled to absolute immunity for warrantless electronic surveillance in domestic national security cases. As Solicitor General, you filed an amicus curiae brief in the case of Padilla v. Yoo, arguing that the courts should not recognize any cause of action against Department of Justice lawyers who gave advice on national security matters, even if those lawyers sanctioned torture by United States officers. Do you think that Justice Department lawyers should not be held accountable for their actions?

14. In Rasul v. Myers, as Solicitor General, you supported the argument that U.S. officials involved in torture were entitled to qualified immunity, not because they did not know that

torture was illegal, but because they did not know whether a court would later say that Guantánamo prisoners had any legal remedies. Do you think that qualified immunity should protect officials even though they know their conduct was illegal, where they are merely gambling on whether the courts will later say they had the power to hear the case?

15. In McGhee v. Pottawattamie Co., Iowa, as Solicitor General, you filed an amicus curiae brief arguing that state prosecutors were entitled to absolute immunity for manufacturing false evidence against criminal defendants. Your theory was that there was no constitutional violation until the evidence was actually offered at trial, and at that point previous law established that the prosecutors would have absolute immunity. Do you believe that prosecutors should be free to falsify evidence in criminal cases as long as the same prosecutors actually try the case and introduce the false material into evidence?

16. If you believe that government lawyers and prosecutors should be given immunity, either absolute or qualified, for violating the law, because there are other remedies against them – such as potential criminal charges and ethical complaints – what is your basis for concluding that such remedies are effective or even employed?

17. In your oral argument as Solicitor General in the Humanitarian Law Project case, in response to a question by Justice Kennedy, you said you believed the law prohibiting material support to terrorist organizations would prohibit a United States lawyer from filing an amicus curiae brief on behalf of such an organization in a United States court. Later in response to Justice Breyer, you argued that such an application of the statute would be constitutional, as long as the lawyer was not serving as counsel guaranteed by the Constitution, for example in a criminal case. It is certainly constitutional to prohibit such organization from engaging in terrorist acts and to punish those who support such acts, but do you really think it is constitutional to prohibit such organizations from making arguments in our courts?

Solomon Amendment

18. During your tenure as Dean of Harvard Law School, SALT and a consortium of law schools filed suit to challenge the validity of the Solomon Amendment, which permitted the Department of Defense to withhold federal funds from any university whose law school prohibited military recruiters from visiting its campus. Pursuant to the “Don’t Ask-Don’t Tell” policy applicable then and now (though presently under study for possible repeal), the military actively discriminates against gay and lesbian candidates for service, whether as lawyers or in other positions. According to Association of American Law Schools’ membership standards, law schools are encouraged to bar from on-campus interviewing all prospective employers (except the military) who engage in discriminatory employment practices based on race, gender, religion, or sexual orientation. Although you supported the suit challenging the Solomon Amendment, you did so by filing as amicus curiae rather than by joining as a plaintiff. Can you explain why you chose this route?

Diversity

19. During your tenure as the first woman dean of Harvard Law School, 32 tenured and tenure-track faculty were hired. You are credited with having hired a number of faculty members who added ideological diversity to the Harvard faculty, but only 1 of the 32 faculty was non-white and only 7 were women. And although the Oneida Nation donated \$3 million to Harvard Law School for an Oneida Indian Nation Professorship of Law, no tenured faculty member dedicated to American Indian law was hired while you served as dean. Recognizing that as a law school dean at an institution with shared faculty governance, you may have had a limited role in the faculty candidate selection process, these numbers still raise questions about your leadership on the issues of institutional commitment to a) racial and gender diversity; and b) scholarship related to American Indian legal issues. Why does the hiring of diverse faculty not appear to have been more of a priority for you during your tenure as dean? Why were you able to hire a significant number of faculty members to add ideological diversity (but not in American Indian law) and so few to add other kinds of diversity?

20. What is your view of the role and importance of diversity in our nation's schools, both in K-12 and higher education?

21. Do you think that maintaining diversity in our educational institutions is a compelling interest?