

# KAGAN v. KAGAN

CAMPAIGN FINANCE, CONGRESS AND THE COURT

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COMPETITIVE  
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*Congress shall make no law...*

## EXECUTIVE SUMMARY

### Will the ‘real’ Elena Kagan please stand up?

As the Senate considers Solicitor General Elena Kagan’s nomination to the Supreme Court, her philosophy toward the regulation of politics has generated intense interest. In the wake of the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, attention is now focused on the scope and application of campaign finance restrictions as the Senate takes up a bill seeking to effectively reverse *Citizens United*, known as the “DISCLOSE Act,” and as high-stakes campaign finance challenges advance in the courts.

Media reports indicate that Kagan has stated to at least two Senators in private meetings her view that the Court should have deferred to Congress in *Citizens United*, which struck down government restrictions on advocacy for or against candidates by companies, unions and advocacy nonprofits. Kagan’s response suggests that she views the regulation of campaign activity as akin to ordinary economic regulation, where it is appropriate for the Court to defer to Congress. This position would contrast starkly with recent precedents that subject such regulations to “strict scrutiny,” the most stringent standard of judicial review to weigh a governmental interest against a constitutional right.

In Kagan’s academic writings, by contrast, she argued that the Court’s strict scrutiny of campaign finance laws is appropriately rigorous. Her analysis did not offer a reasoned defense for deference, even when the law is one that restricts political activity based on the corporate form of the speaker. Indeed, she contended that such laws might further a content-based agenda to suppress the ideas certain speakers are likely to express. It is impossible to square Kagan’s academic analysis with her reported statements that the Court should have deferred to Congress in *Citizens United*.

The question then is which Elena Kagan would be serving on the Court? The First Amendment issues dominated the *Citizens United* debate. The government argued, among other things, that the Constitution allowed limits on the publication and distribution of any corporate-sponsored communications, including books, pamphlets and movies

Given that President Barack Obama used Kagan’s nomination announcement to indicate she shared his critical view of the *Citizens United* decision—and considering Kagan has written that nominees should not dodge questions about legal philosophy at confirmation hearings—Senators should insist that Kagan address the apparent conflict between her long-held views and recent comments to Senators about deference to incumbents in Congress regarding campaign finance regulations.

If the DISCLOSE Act passes, Kagan could eventually consider a challenge to the law’s provisions at the Supreme Court. Even so, she could appropriately answer a general question about her jurisprudential philosophy on campaign finance and political speech. This would allow Senators to make an informed judgment as they fulfill their constitutional role to “advise and consent.”

Documents from Kagan’s tenure in President Bill Clinton’s administration further indicate her once critical disposition toward campaign finance regulation. They also demonstrate that the political impact of campaign reform measures is never far from the minds of politicians crafting

the laws, often in the name of political “reform.” Throughout the files are indications that the individuals involved, including Kagan, were keenly aware of the partisan impact of certain proposals, and placed those partisan concerns at the center of their analysis.

Judging Solicitor General Kagan’s personal views on campaign finance is more difficult. The documents show her apparent concern about the constitutional problems presented in the various campaign finance packages proposed in 1996 and 1997. That record would fit well with her pre-Administration scholarship, and would place her among those who believe deference to the Congress is inappropriate when the issue is the regulation of politics. But—again—this interpretation conflicts with her recently reported comments that the Court should defer to Congress in campaign finance regulation.

The “real” Elena Kagan’s views on campaign finance regulation remain unclear. Her scholarship and work at the White House indicate her concern for the burden campaign finance restrictions place on political speech. But her recent public statements suggest she would defer to Congress. Perhaps her opinion has changed since leaving the Clinton Administration, or perhaps she feels compelled to conform to the Obama Administration’s stated views. Integrity and independence are among the most important characteristics for a Supreme Court Justice, and additional inquiries to resolve this quandary would bring meaningful heft to often “vapid” confirmation hearings, as Kagan herself once articulated.

# CONGRESS AND CAMPAIGN FINANCE REGULATION: DEFERENCE OR DISTRUST?

## I. Advocate: Kagan's defense of the government's position in *Citizens United*

### A. *Grassroots v. Government: Kagan and deference to Congress*

As the Senate considers Solicitor General Elena Kagan's nomination to the Supreme Court, her philosophy toward the regulation of political speech looms large. Kagan's first appearance before the Court was to argue against *Citizens United* and its claim that the First Amendment protected its right to distribute a documentary called *Hillary: The Movie*. President Obama, in tapping Kagan, singled out her decision to take on the *Citizens United* case as a reason he selected her for the Supreme Court.<sup>1</sup> In the wake of the Supreme Court's decision in *Citizens United*, attention is now focused on the scope and application of campaign finance restrictions in a number of contexts.

In general, the legal conflict is between two views of political regulation. One holds that political activity, in particular financial activity, is at the core of the First Amendment protection of speech, assembly and the right to petition the government. Congress can only regulate political spending if restrictions are necessary to fight corruption, in this view, and the Court should carefully scrutinize laws to ensure they fit within this narrow constitutional margin. The contrary view holds that political spending is more akin to ordinary economic activity. The Court defers to Congress when it enacts such laws, unless there is an indication that the law invidiously discriminates or burdens some fundamental right.

Briefly, *Citizens United v. Federal Election Commission* revolved around the efforts of a conservative, non-profit membership organization, *Citizens United*, to advertise by radio and television and to distribute by video on demand a documentary film titled *Hillary: The Movie*. However, broadcast advertising for the film during the 2008 presidential primary season would have violated provisions of the Bipartisan Campaign Reform Act of 2002 (often called "McCain-Feingold" for its primary Senate sponsors). Further, airing the film by video on demand would violate McCain-Feingold, and, if the unflattering documentary was determined to be advocacy against Clinton's election, would also violate older provisions of campaign finance law. Those provisions prohibited corporations from spending any money at all to advocate the election or defeat of candidates. *Citizens United* could be exempted from both provisions if it were determined that the movie fell under the law's "media exemption," which exempts from its prohibitions coverage in periodicals and news broadcasts. The media exemption, however, does not apply, by its terms, to movies, and past decisions by the Federal Election Commission as to its applicability to movies had been made on an ad hoc basis by the Commission.<sup>2</sup>

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<sup>1</sup> Remarks by the President and Solicitor General Elena Kagan at the Nomination of Solicitor General Elena Kagan to the Supreme Court, May 10, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>.

<sup>2</sup> See Federal Election Commission, MUR 5467 (Michael Moore 2004), MUR 5474 (Dog Eat Dog Films 2005), and MUR 5539 (Fahrenheit 9/11 2005) (finding film *Fahrenheit 9/11* did not violate the law) with Federal Election Commission Advisory Opinions 2004-15 (David Hardy) and Advisory Opinion 2004-30 (*Citizens United*) (holding documentary films would violate statute.) See also Advisory Opinion 2010-08 (*Citizens United*), decided June 10, 2010, holding that *Citizens United* could claim the press exemption for future films.

At oral argument in March, 2009, just a few days after Kagan had assumed the position of Solicitor General, Deputy Solicitor General Malcolm Stewart argued the *Citizens United* case for the government. Basing his argument on a 1990 case, *Austin v. Michigan Chamber of Commerce*, Stewart argued that the government could prohibit any corporate spending that might advocate the election or defeat of a candidate.<sup>3</sup>

Stunned by the scope of Stewart's argument (virtually all books are published, distributed, and sold by corporations), the Court ordered reargument in September 2009 to consider whether it ought to overrule the 1990 *Austin* decision. Solicitor General Kagan chose to make this her first appearance before the Court.

At the September reargument, Solicitor General Kagan moderated the government's rhetoric. She argued that although the government could prohibit corporations from publishing political books, in fact it had not done so.<sup>4</sup> Further, she suggested that particular publishers could, if necessary, seek "as-applied" constitutional exemptions for particular books. However, she also indicated that books might be constitutionally censored if Congress were to make findings that they posed a "corruption problem." She also argued that "pamphlets" and, of course, movies such as *Hillary: The Movie* could be censored by the government if they were published, distributed, or marketed by a corporation or using any corporate or union funds.<sup>5</sup> Nevertheless, the Court released its decision in *Citizens United* in January, rejecting the government's analysis, overruling *Austin* and declaring unconstitutional the federal law, and by implication the laws of 22 states, that prohibited corporations and unions from spending any funds for candidate advocacy.<sup>6</sup>

## **B. Representing a client, or speaking her mind?**

It seems unclear, though, where Kagan herself would stand among the spectrum of views on campaign finance jurisprudence. Thus, the question raised by Kagan's record is to what degree she would defer to Congress in the regulation of campaigns. Sen. Arlen Specter (D-Penn.) has released letters questioning her views on *Citizens United* and the pending challenge to Arizona's tax financing law, *McComish v. Bennett*. Reports indicate that in private conversations with Senators leading up to the Senate hearings, Kagan opined that the Court in *Citizens United* should have

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<sup>3</sup> Under questioning by Justice Samuel Alito, Stewart argued that this principle would apply not only to films such as *Hillary: The Movie* but also to the publication and distribution of books. Under further questioning, Stewart responded to a question from Justice Anthony Kennedy that under McCain-Feingold the government could prohibit the distribution of political books through Amazon's Kindle, and that doing so would comport with the First Amendment as interpreted in the *Austin* decision. Answering Chief Justice John Roberts, he argued that the government could ban the publication by a corporation of a 500 page book containing even one sentence of "express advocacy" for or against a candidate. And in response to then Justice David Souter, he argued that the government could prohibit a union from hiring a writer to author a pro-union pamphlet that advocated the election or defeat of particular political candidates.

<sup>4</sup> Others, however, have noted that the FEC has investigated a book and in some cases attempted to prosecute publishers of books, magazines, and newsletters, only to be stymied by the courts. See Bradley A. Smith, *Citizens United We Stand*, *The American Spectator*, May 2010; Former FEC Commissioner Hans A. von Spakovsky notes that the FEC spent nearly four years investigating a complaint regarding corporate expenditures to market a book by George Soros before deciding not to pursue the matter further on a 3-3 vote. See MUR 5642 (George Soros 2008).

<sup>5</sup> See *Citizens United v. Federal Election Commission*, Oral Argument Transcript at 64-66.

<sup>6</sup> Prior to *Citizens United*, 26 states allowed unlimited corporate spending in elections, while 22 states banned corporate spending. Two states allowed corporate spending subject to a cap, and these laws were also overturned by the decision. The Court did not strike down other provisions of the Federal Election Campaign Act that prohibit spending by foreign corporations and prohibit direct corporate contributions to candidate campaigns or parties.

deferred to the judgment of Congress prohibiting all corporate independent expenditures in federal elections.<sup>7</sup> She has not confirmed or challenged these reports.

If accurate, Kagan's response would suggest that she views the regulation of campaign activity as akin to ordinary economic regulation, where it is appropriate for the Court to defer to Congress. This position would contrast starkly with recent precedents, such as *Citizens United*, that protect political speech from regulation—as well as the text of the First Amendment: “Congress shall make no law... abridging the freedom of speech.”

Kagan's record on issues of political regulation, including her academic writing and documents produced by the Clinton Library, may illuminate her views as the Senate considers her nomination. This analysis now takes what is publicly available from Kagan's record and draws conclusions when possible from that information.

## II. Scholar: law professor with an interest in First Amendment jurisprudence

Solicitor General Elena Kagan's academic writing has focused on administrative law and constitutional law. Kagan does not have an extensive body of work, but several of her articles bear on issues raised in challenges to campaign finance regulation.

Kagan published an essay in 1993, in which she considered laws against pornography and hate speech, and the Supreme Court's then cutting-edge opinions finding those laws unconstitutional.<sup>8</sup> Although this essay discussed her views of the scope of the First Amendment, it was in the context of very low value—even unprotected—speech. That is, hate speech laws that apply to “fighting words” restrict speech the Supreme Court has long held unprotected under the First Amendment, and pornography is “low value” speech that, when it falls with the classification of obscenity, is also unprotected. Political speech, by contrast, is at the core of First Amendment protection.

Accordingly, this article is not directly relevant to campaign finance regulation. Even so, Kagan concludes that the Court will continue to find viewpoint discriminatory laws presumptively unconstitutional, and will do the same for content-based speech restrictions save in a few specific categories (she mentioned commercial speech). This article doesn't give observers a perfect measure of how Kagan would view restrictions on political speech. But in her analysis, Kagan proposes approaches to the restriction of hate speech and pornography that might, in her view, better survive constitutional scrutiny. One proposal she offers is to craft laws that address conduct, rather than expression.<sup>9</sup> That idea suggests she would show continued allegiance to the contribution/expenditure distinction in the landmark case setting the foundation for modern campaign finance jurisprudence: *Buckley v. Valeo*. This is because one justification for permitting restrictions on contributions (but not independent expenditures) is that the contribution is more akin to “conduct” that isn't restricted based on expressive content, but an independent expenditure is expression, and its restriction would necessarily involve a content-based burden.

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<sup>7</sup> See, e.g., Manu Raju, “Specter Softens on Kagan,” Politico, May 13, 2010 (quoting Sen. Arlen Specter, “When you talk about *Citizens United* . . . She said there wasn't sufficient deference to Congress, something I feel very, very strongly about.”).

<sup>8</sup> Elena Kagan, Regulation of Hate Speech and Pornography after RAV, 60 U. Chi. L Rev. 873 (1993).

<sup>9</sup> Id. at 885-86. In another article, Kagan discusses how indirect restraints on speech in fact attempt to separate neutral laws that seek to reach harm that may be caused by expression, and direct restraints on content. Elena Kagan, When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints, 29 U.C. Davis L. Rev. 957 (1995)

In any case, Kagan does *not* take the Court to task for rejecting deference to legislative judgments when viewpoint or content-based burdens are applied—even to *low-value* speech. It is difficult to imagine how this position could be squared with one that supported deference to Congress when it makes a content-based distinction in regulating expenditures because of their political content. This is precisely what Congress did when it prohibited all corporations from making expenditures or electioneering communications in federal elections, and so the *Citizens United* holding would not appear to be at odds with her analysis.

Kagan’s 1996 article *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine* has received the most attention.<sup>10</sup> In this article, she contends that modern First Amendment doctrine has been primarily directed toward identifying laws that serve improper governmental motives.<sup>11</sup> “[T]he application for First Amendment law is best understood and most readily explained as a kind of motive-hunting.”<sup>12</sup> She does not argue that the Court meant to develop doctrine that functions this way, but that the rules it has developed are best explained as this.<sup>13</sup> Intriguingly, among the motives she identified as impermissible as those that serve “officials’ own self-interests—more particularly, their tenure in office.”<sup>14</sup> She continued “The government . . . cannot count as a harm . . . that speech may promote the removal of incumbent officeholders through the political process.”<sup>15</sup> She distinguishes these bad motives from the legitimate motive the government might have in restricting expression in the interest of preventing real harm. The Court’s First Amendment doctrine, in her view, has evolved to identify likely instances of bad motive that deserve scrutiny, not deference. In this way, the Court can protect speech from unconstitutional burdens without the Court diving into the messy analysis inherent in evaluating legislative intent.<sup>16</sup>

In particular, she explained the Court’s holding in *Buckley* that law “equalizing speech” were unconstitutional is best understood as a rule designed to identify impermissible governmental motives. She observed: “The *Buckley* principle emerges . . . from the view that governmental actions justified as redistributive devices often (though not always) stem partly from hostility or sympathy toward ideas— or, even more commonplace, from self-interest.”<sup>17</sup> In a footnote, she also observed that restrictions on speech based on the identity of the speaker, such as the corporate expenditure bans considered in *Austin v. Michigan Chamber of Commerce* and *First National Bank of Boston v. Bellotti*, might also be unconstitutional since, as she noted “[p]articular speakers . . . tend to say particular things.” Such superficially neutral laws may conceal an indirect attempt to restrict conduct.<sup>18</sup> Kagan explicitly recognized that “campaign finance laws . . . easily can serve as incumbent-protection devices” and when applied to certain speakers “the danger of illicit motive becomes even greater.”<sup>19</sup>

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<sup>10</sup> Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996).

<sup>11</sup> *Id.* at 414.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 415

<sup>14</sup> *Id.* at 428

<sup>15</sup> *Id.* at 428-29.

<sup>16</sup> *Id.* at 440-42. She acknowledged that some Supreme Court decisions considering restrictions on “subject matter” find them constitutional, either by applying a dilute form of strict scrutiny or by denying that a content-based distinction is in play at all. See *id.* at 444.

<sup>17</sup> *Id.* at 467.

<sup>18</sup> *Id.* at 468 n. 151.

<sup>19</sup> *Id.* at 470.

In her 1996 article, Kagan provided her explanation for why the Court shows deference to legislative judgments that burden speech in some contexts but closely scrutinizes them in others. Taking her analysis at face value, she argued that the Court's strict scrutiny of campaign finance laws is appropriately exacting. Her article does not offer a reasoned defense for deference, even when the law is one that restricts political activity based on the corporate form of the speaker. Indeed, she contended that such laws might further a content-based agenda to suppress the ideas certain speakers are likely to express. It is impossible to square Kagan's analysis in this article with the reported statements made that the Court should have deferred to Congress in *Citizens United*.

### III. Political Lawyer: White House Counsel and Domestic Policy Advisor

Documents from Kagan's tenure in the Clinton Administration also indicate her critical disposition toward campaign finance regulation. The Clinton Library has made publicly available online scores of boxes of documents and emails archived from her tenure as Associate White House Counsel in 1995-96, and Deputy Assistant to the president for Domestic Policy in 1997-99.<sup>20</sup>

This material contains inside accounts of two particular reform initiatives. The first was the White House's reaction to (and involvement with) congressional efforts to enact campaign finance reform in 1996. The second was the Clinton Administration's 1997 reform initiative taken in light of the Democratic National Committee 1996 campaign finance scandal, which ultimately evolved into efforts to support McCain-Feingold in September 1997.

#### A. The 1996 legislative effort

Memos from early 1996 reflect the Clinton Administration's commitment to "reform" without showing much particularity about the detail of that reform.<sup>21</sup> The bill then under consideration, S. 1219, was broad and ambitious.<sup>22</sup> It provided for government funding of campaigns, banned PACs, severely restricted out-of-state contributions and contributions from lobbyists, and banned bundling, among other provisions. Internal memoranda contended that the "reform" was a good political cause, since "the public appetite for reform has grown so great."<sup>23</sup> Yet in notes from a March 5 meeting, Kagan demonstrated great skepticism about the constitutionality of the limit on out-of-state contributions.<sup>24</sup> Notations in Kagan's handwriting also reflect her observation that Congressional hearings would be necessary to provide the "factual predicates" necessary to prevail in a court challenge.<sup>25</sup> Her view seems to have been that Congress had a burden to build a factual record to "earn" deference in court challenges—deference it otherwise wouldn't get as the presumption would be that incumbents craft campaign laws to entrench themselves.

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<sup>20</sup> The Clinton Administration documents are available at <http://www.clintonlibrary.gov/textual.html>. They consist of files, emails composed, and emails received by Kagan. Citations to these materials will list the box number, folder number, and page of the PDF document of the folder's contents. Many documents can be found in more than one folder.

<sup>21</sup> Doc Box 34, folder 4 pp. 15-77.

<sup>22</sup> See summary provided by Project Votesmart at [http://img.votesmart.org/issue\\_keyvote\\_detail.php?cs\\_id=8611&can\\_id=53270](http://img.votesmart.org/issue_keyvote_detail.php?cs_id=8611&can_id=53270)

<sup>23</sup> Id. pp. 43-44 (Kagan coauthored memo on partisan implications for Harold Ickes) 49-51 (Bill Curry memo to Ickes); Id. pp. 61-62 (Paul Weinstein memo to President dated Feb. 1, noting reform good issue to use in New Hampshire.)

<sup>24</sup> Id. p. 45.

<sup>25</sup> Notes from 11/21 meeting, Doc Box 34, folder 4 p.57.

Kagan wasn't the only skeptic in the Administration. Clinton's Office of Legal Counsel in the Department of Justice expressed doubts about S. 1219's constitutionality in May and June.<sup>26</sup> The Justice Department's views were eventually packaged into "suggestions" for "strengthening" the bill, rather than reasons not to support the bill. Kagan's markup of the DOJ draft analysis shows her apparent agreement with DOJ on such points as the unconstitutionality of deeming any expenditure made by a person who had advised a candidate as a contribution, discriminating against out-of-state speakers in the limits placed on out-of-state contributions, and increasing the contribution limit for publicly funded candidate who face nonparticipating opponents who overspent the voluntary expenditure limit.<sup>27</sup>

Kagan's markings on the OLC analysis of S. 1219 prepared by Randy Moss are similar. Among other things, she noted that the provision raising contribution limits for government funded candidates would violate the anti-equalization rationale in *Buckley*.<sup>28</sup> However, in a handwritten note accompanying these edits, she suggested that the raised contribution limit for government funded candidates facing an opponent who spent over the voluntary limit was not a penalty, but instead "one among many benefits we give to encourage speakers to abide by the voluntary limits."<sup>29</sup>

Kagan's and OLC's criticisms did not dampen the Administration's enthusiasm for the bill, however, and both email and documents indicate the White House moved to "head off" critical letters from OLC.<sup>30</sup> Kagan was tasked with this duty. Afterwards, she reported back to Jack Quinn, White House Counsel at the time, that she had spoken to OLC to inform them that their letter would likely not be approved by OMB once policy staff objected to it. To that, OLC replied that "OLC did not have adequate time to prepare bill comments on the campaign finance legislation..."<sup>31</sup> Kagan succeeded in discouraging the OLC from expressing its dissenting opinion.

Another file, not specifically dedicated to S. 1219, contains Kagan's notations on a variety of proposals from pro-campaign finance regulation organizations. She marked one proposal, which would prevent parties from making coordinated expenditures if the party had previously made an independent expenditure, with "Can't make IEs w/out giving up rt. to make CEs. No good."<sup>32</sup> Yet Kagan also approved drafts of administrative policy and letters that stated the Administration's commitment to "reform," even policies she indicated in notations would be unconstitutional in her view.<sup>33</sup> After July 1996, Kagan did little work on campaign regulation until the 1997 initiatives, which we turn to next.

## **B. The 1997 'reform' effort**

In the closing days of the 1996 presidential campaign between President Clinton and Senator Bob Dole, investigative reporters unearthed incidents where foreign nationals raised funds and

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<sup>26</sup> Doc Box 34, folder 5 pp. 3-33.

<sup>27</sup> Doc Box 34, folder 4 pp. 84-90.

<sup>28</sup> Id. pp. 99-105.

<sup>29</sup> Id. p. 105.

<sup>30</sup> Composed Email Box 11, folder 1, p. 90 ("find out where Justice is on all these bills and (probably) try to head off DOJ views letters. That last assignment is of course mine."); Doc Box 34, folder 4 p 11 (Memo to Jack Quinn and Kathy Wallman).

<sup>31</sup> Doc Box 34, folder 4 p. 11.

<sup>32</sup> Doc Box 35, folder 4 p. 13.

<sup>33</sup> See Received Email Box 1, folder 6, pp. 27-28, 32-36, 48-50; Composed Email Box 11, folder 1 p. 100.

donated to the DNC's 1996 political efforts in violation of federal laws.<sup>34</sup> In reaction, individuals within the Administration proposed a ban on contributions from all non-citizens, not just foreign nationals. Kagan drafted the talking point on that proposal, which included a suggested response to the question of its constitutionality.<sup>35</sup> This response has received recent press attention for the declaration that "I believe to be mistaken" the Court's holding that "money is speech." The documents clearly indicate that this is not necessarily a statement of Kagan's own opinion, but an effort to develop talking points to defend a ban on non-citizens making contributions. Further evidence for this conclusion is in a handwritten note from Kagan to Jack Quinn, where she states "I think it's pretty clear that the ban on non-citizen contributions is unconstitutional (though a ban of foreign contributions would not be). OLC agrees with this conclusion."<sup>36</sup> Nevertheless, she offered the talking point text as an explanation. Eventually, the administration threw its support behind the 1997 version of McCain-Feingold (described more fully below), which, among other things, would have further limited the political activity of foreign nationals (not noncitizens).<sup>37</sup>

The Administration remained supportive of other aspects reintroduced from the 1996 legislation. Kagan, for her part, continued to identify issues of unconstitutionality when she spotted them. In her review of a memo written by John Hilley, the Administration's Director of Legislative Affairs, Kagan complained that its analysis should not tout "'constitutionally' valid proposals to limit independent expenditures."<sup>38</sup> She argued "I doubt such proposals exist and I am wary of touting this notion to the President," to which Jack Quinn responded, "Right—and memo should be clear on this point— otherwise he'll think we can do it."<sup>39</sup> This file also contains several charts detailing the soft money receipts by political party, as well as a summary of foreign funding of Republicans, indicating a continuing sensitivity to the partisan impact of campaign finance restrictions.<sup>40</sup>

Kagan's files from this initiative also contain her comments on Common Cause's proposals. Specifically, she noted next to proposed language that would find "any coordination between a person and a candidate during an election cycle shall constitute coordination for the entire election" the following: "Once coord occurs— every thing else deemed coord—even issue ads! Can't be right."<sup>41</sup> Similar remarks are in Kagan's notes from policy meetings on campaign finance discussing whether party independent expenditures could trigger lower party contribution limits.<sup>42</sup> Interestingly, these meetings were summarized for the President in a Dec. 13, 1996 memorandum from Legislative Affairs staff, but the documents in Kagan's file indicate that such a memorandum should have come from the Counsel's office.<sup>43</sup> Clearly, the Legislative Affairs staff and the Counsel's office had different views on how the Clinton Administration should pursue campaign finance policy.

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<sup>34</sup> See, e.g., Alan C. Miller, *Controversy Swirls Over Donations to Democrats*, L.A. Times, Oct. 14, 1996; Evelyn Iritani, *Indonesian Fulfills Aim for Firm, Nation*, L.A. Times, Oct. 16, 1996.

<sup>35</sup> Composed Email Box 1, folder 3 pp. 41-42; Box 11, folder 5 pp. 49-50; Received Email Box 2, folder 4 25-36, 39-44 (drafts of talking points).

<sup>36</sup> Doc Box 35, folder 4 p.40-41, 46.

<sup>37</sup> Received Email Box 17, folder 4 pp. 34-37.

<sup>38</sup> Doc Box 35, folder 4 pp.19, 22, see also Hilley memo at 23-25.

<sup>39</sup> Id. at 22 (with Quinn notation).

<sup>40</sup> Id. at 29-38, see also Doc Box 35, folder 1, pp. 46-47; DPC Doc Box 6 folder 6 p. 3 ("soft \$ ban – affects Repubs not Dems").

<sup>41</sup> Doc Box 35, folder 1 p. 4.

<sup>42</sup> Id. at 31 ("If make IEs, limits on contribs lowered. Unconst.")

<sup>43</sup> Id at 40-45. This copy contains Quinn's remark that the memo should have come from Kagan, and Kagan's response that "one of you must make that clear to Hilley" since she had no time to "do enough editing – for me to want our name to go on it."

Kagan was also involved in how issues should be strategically presented on Capitol Hill, which had its own political aspects. In notes dated Jan. 10, 1997, she observed that Sen. John Kerry would want to introduce one set of reforms, observing he “wants to come in at last— be savior.”<sup>44</sup> The Clinton White House also sought to implement campaign finance regulations administratively in 1997. In February, Kagan exchanged a series of emails with staff inquiring how much of their agenda could be achieved through changes in Federal Election Commission interpretation. Limits on foreign contributions and changes in FEC procedure could not be accomplished through rulemaking, according to Justice Department lawyers.<sup>45</sup> However, those sources believed the FEC could revise its party allocation ratios, and reduce the utility (and the role) of soft money.<sup>46</sup> Kagan pushed back, asking “Is Justice right? We should be aggressive here.”<sup>47</sup> Ultimately she was apparently satisfied with this answer. By June, the White House released Clinton’s petition to the Federal Election Commission to ban soft money.<sup>48</sup>

This collection ends with material from August and September 1997, in which the White House considered and eventually embraced a scaled-down campaign finance reform bill focused on soft money and issue advertising.<sup>49</sup> This bill resembled the ultimately successful McCain-Feingold package known as the Bipartisan Campaign Reform Act of 2002, or BCRA.

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<sup>44</sup> DPC Doc Box 6, folder 6 p. 4.

<sup>45</sup> Received Email Box 4, folder 2 p. 60. This email concluded: “There is also, of course, no obstacle to our appointing persons to the FEC who are committed to reform . . .”

<sup>46</sup> *Id.*

<sup>47</sup> Composed Email Box 11, folder 7, p. 18; see also Received Email Box 4, folder 3 p. 8-9.

<sup>48</sup> Composed Email Box 12, folder 5 pp. 74-75; Box 12, folder 6 pp. 2-11. In Feb. 1998 the White House again urged the FEC to ban soft money administratively, see DPC Doc Box 6, folder 8.

<sup>49</sup> Composed Email Box 4, folder 1 p. 83; Received Email Box 15, folder 1 pp. 45-49; Received Email Box 17 folder 4 pp. 34-37 & pp. 44-47.

## CONCLUSION

One major point affirmed in these materials is that the political impact of campaign reform measures is never far from the surface. Throughout the file are indications that the individuals involved, including Kagan, were keenly aware of the partisan impact of certain proposals. They believed soft money prohibitions disproportionately burdened Republicans, and that belief contributed to their support for that law. This is hardly a new phenomenon. If politicians are set with the task of changing the rules governing politics, it would be against their interests and character not to try to create advantages for their colleagues and supporters. But as we venture into yet another process of crafting “reform” it is a lesson we should remember. For some justices, this has been a reason to be particularly skeptical of campaign finance laws. Others, however, have suggested that Congress’s “expertise” in the area merits more deference than usual.

Solicitor General Kagan’s personal views are difficult to pin down. The documents show her apparent concern about the constitutional problems presented in the various packages proposed in 1996 and 1997. It may be that these notes and exchanges demonstrate her personal commitment to First Amendment protection for political speech. That record would fit well with her pre-Administration scholarship, and would place her among those who believe deference to the Congress is inappropriate when the issue is the regulation of politics. The one exception would be for her views on what are now called “matching” or “rescue” funds— that is, financial support or loosened fundraising rules for certain candidates if opponents spend “too much.” Kagan’s notes indicate she had concluded these laws were permissible incentives for complying with other limits.

But this interpretation conflicts with her recently reported comments that the Court should defer to Congress in campaign finance regulation. Assuming that this is her sincere view, and not an opportunistic one, it is very hard to square her call for deference with her scholarship, where she should be arguing what she believed to be the strongest argument. It is easier to square with her Clinton administration record if one assumes she is tasked with playing the “Devil’s advocate” on constitutional issues. It would be reasonable for the Administration to expect her to criticize proposals internally, since her insights could provoke refinements. But once decisions were made, her role would change. Thus it is not clear whether her criticisms indicate her views, or the views she believed would be held by critics. Yet, her notations in many places show genuine passion that would be unlikely were these views not genuine.

Ultimately, the “real” Elena Kagan’s views of First Amendment and campaign finance jurisprudence remain unclear. Her scholarship and work for the White House indicate her concern for the burden campaign finance restrictions place on political speech. But her recent statements to Senators suggest she would defer to Congress on such matters. Perhaps her opinion has changed since leaving the Clinton Administration, or perhaps she feels compelled to conform to the Obama Administration’s views on campaign finance policy. Either way, the Senate—and, more importantly—the public, deserves to know how Kagan would approach these weighty issues during a lifetime tenure on the Supreme Court.