JUDICIAL WATCH, INC.

FORUM TRANSCRIPT
"A CONSERVATIVE PREVIEW OF THE KAGAN NOMINATION"

MODERATOR:
TOM FITTON, PRESIDENT,
JUDICIAL WATCH

FEATURING:

BRIAN DARLING FROM THE HERITAGE FOUNDATION;

CURT LEVEY FROM THE COMMITTEE FOR JUSTICE;

CARRIE SEVERINO FROM THE JUDICIAL

CRISIS NETWORK

FORUM HELD
JUNE 22, 2010
WASHINGTON, D.C.

Transcript provided by
DC Transcription & Media Repurposing

MR. TOM FITTON: Good afternoon everyone. I'm Tom Fitton. I'm president of Judicial Watch. And Judicial Watch is a conservative non-partisan educational foundation dedicated to promoting transparency, accountability, integrity in politics, government and the law. Through its educational endeavors, Judicial Watch advocates high standards of ethics and morality in our nation's public life and seeks to ensure that political and judicial officials obey the law and do not abuse the powers entrusted to them by the American people.

As part of our Judicial Nominations Project, which monitors judicial nominations and opposes judicial activism, we are pleased to present this educational panel which will give a conservative preview on the Kagan confirmation battle. We're lucky to be joined by leading conservative judicial activists who have exhaustively studied Elena Kagan's record or at least the record that the Obama White House isn't keeping secret.

I'll give a brief overview and I'll suspect our panelists will add further devastating detail on Kagan's radical record and how the Senate ought to treat her nomination.

President Obama's nomination of Elena Kagan to the Supreme Court is irresponsible. Ms. Kagan is a liberal activist and a political operative with no experience as a judge. A Supreme Court nominee ought to have significant practical experience both as a lawyer and a judge.

Her biography includes work for the campaigns of ardent liberals Elizabeth Holtzman, who's a radical feminist out of New York, and Michael Dukakis who all of you may know. She practiced law a total of three years, one of them for the Clinton White House. She also clerked for the late Thurgood Marshall, one of the most liberal Supreme Court members in recent history. Much of the rest of her career was spent working as a domestic policy aid in the Clinton White House and in academia where she became the first female dean of Harvard Law School.

So three years, barely four if you include her on the job training as a United States solicitor general, practical legal experience, and a few years clerking in the federal courts which frankly is too little experience for the high court.

The fact that she continued the work in the Clinton White House after it became clear that President Clinton lied under oath raises questions about her ethical judgment. You know, I know that it is not political correct here in Washington to remind folks that Bill Clinton abused his office and lied under oath but Judicial Watch believes that lawyers like Kagan who happily worked for him despite his misconduct in office need to be held to account as to why they continue to work for the impeached Clinton despite his contempt for the rule of law.

Her decision to throw military recruiters off the campus of Harvard Law School during a time of war shows she is far to the left of mainstream America. In kicking out the military, Kagan was in violation of a law known as the Solomon Amendment and she only let recruiters back on her campus when the Defense Department told her school it would withhold federal funds otherwise. Kagan sought to have the Solomon Amendment overturned – this is the law requiring schools to provide equal access to military recruiters – but the Supreme Court knocked her effort down eight to zero. Not even leftists on the court, including Justice Stevens, who Kagan is seeking to replace, agreed with her radical effort to force the federal government to fine colleges who ban military recruiters from campus.

It is a sight to see the Obama crowd spin Kagan's ban on military recruiters because military followed the "Don't Ask, Don't Tell" law passed by Congress and signed into law by President Clinton as pro-military. Talk about out of touch.

Ms. Kagan's record, as spotty as it is, shows that she is a committed liberal judicial activist. Even President Obama in his statement introducing her nomination extolled her personal interest in supporting government regulation and the outright banning of political speech. This is in the context of the Citizens United Supreme Court decision on which Solicitor General Kagan was on the losing end of her first major case.

I trust President Obama picked a nominee – I trust President Obama. I trust him he'll pick the nominee who buys into these lawless standards for judicial nominations which means judges who are results oriented are biased in favor of liberal causes or favorite groups and substitute their personal opinions and political views for the plain words of the U.S. Constitution.

And tea party activists ought to be paying close attention to this nomination as well. With looming constitutional battles ranging from Obamacare to illegal immigration to new rights for terrorists, the United States Senate should ensure that only a justice who will strictly interpret the U.S. Constitution is approved. There's no reason to believe that Ms. Kagan meets the standard.

Believe it or not, I've only skimmed the surface of the issues related to Elena Kagan whose confirmation hearing is schedule to begin next week on June 28th.

We're pleased to be joined, as I said earlier, by several activists on the front lines in the Kagan confirmation battle who can tell us what to expect, what to be concerned about and what to do over the next few weeks. Curt Levey hopefully will be joining us soon. Carrie Severino is chief counsel and – did I pronounce your last name correctly?

MS. CARRIE SEVERINO: Severino.

MR. FITTON: Severino. Sorry – is chief counsel and policy director for the Judicial Crisis Network. Until March of 2010 she was an Olin/Searle fellow and a dean's visiting scholar at Georgetown Law. She previously was a law clerk to the U.S. Supreme

Court for Justice Clarence Thomas and on the U.S. Circuit Court of Appeals for the District of Columbia circuit here for Judge Sentelle. She's a graduate of Harvard Law School and of Duke University and holds a master's degree in linguistics from Michigan State University. So she'll be able to tell us what the meaning of this is.

Brian Darling is director of Senate relations at the Heritage Foundation. He's responsible for educating senators – I can't think of a more onerous task – and their staffs about Heritage's latest research and policy recommendations. Darling monitors political developments in the Senate as well as the relations with the House and the White House to assess the likely impact on policy discussion. He frequently comments all throughout the media on issues before Congress and he's appeared on ABC News and CBN, CNBC, CNN, all the big networks. He became a columnist in last – it was two years ago – for HumanEvents where he reaches 154,000 weekly readers and I'm sure even more so on the Internet. And before joining Heritage in 2005, he worked in the Senate. He worked for Mel Martinez. He also worked for Bob Smith where he served as a staff member for the Judiciary Committee. And he was a conservative leader really on the Hill working with conservative staff and developing policy and conducting regular meetings.

So we're pleased to be joined by our two distinguished colleagues and guests. And the way this panel will work is that our guests will make their presentations, we'll talk maybe a little bit more here at the table and then we'll open it up to questions and comments. So I'll start off with Carrie. Thank you.

MS. SEVERINO: Great. Thanks for having me. When Justice John Paul Stevens announced his retirement this April, he presented President Obama with an incredible opportunity for a president. This is one of the most long reaching decisions a president will make in office. If we have another Supreme Court justice who sits as long as Justice Stevens did, they will be on the court for upwards of three decades. So this is one of the nine justices who is the last call on all major constitutional issues and federal law issues in our nation.

So if you were the president, who would you choose for such an exalted position? Would you pick an eminent jurist with years of experience in the bench, known for their fairness and application to the law? Perhaps. President Obama did not. He chose someone who had zero years of experience on the federal or state bench of any level, trial or appellate.

Would you choose someone who is a celebrated litigator, for example, someone like Chief Justice Roberts? He had judicial experience but he also was widely regarded as one of the top Supreme Court advocates before he joined the bench. President Obama did not. He chose someone who had virtually no practical experience, had never argued a case in any court, federal or state, even traffic court. So he chose someone who hadn't really seen the inside of a courtroom very much. Most of her actual legal experience was very early on in her career right after she had finished clerking.

So you would choose someone perhaps who was a prolific academic, who was well known as a leader in the field and trendsetting in constitutional theory perhaps? You might make such a decision. President Obama did not. Elena Kagan was an excellent dean of Harvard Law School. I was at Harvard when she was the dean. She was the first female dean – wonderful record setting type of deanship. However, she was not a prolific academic. She was awarded tenure with very minimal level of scholarship.

In fact, her focus even when she was at University of Chicago before she was at Harvard was so skewed toward the political and not as much academic that after she finished in the Clinton White House, they didn't ask her to come back and she had to go find another place that will grant her tenure. In some amazing way, she was able to get tenure at Harvard Law School and get hired on having only one legal paper to her name at the time, if I recall correctly. So it's quite an accomplishment but it's not exactly a record of eminent scholarship.

So it seems that the president's chief attribute that he was looking for is inscrutability. If there's one thing everyone agrees about Elena Kagan is we don't really know what her positions are or there's really no evidence for what her positions are on many important issues of the day. And if that's what you want as a president, Elena Kagan is a fine pick. However, we think America deserves better.

So what does her lack of experience and lack of a record do to change the way this process should look? I think it changes it in a few ways.

First of all, her lack of experience and lack of any kind of real applied legal experience means that we have to be very careful that this is not someone who's going to have to be making it up and learning on the job. Historically, there have been judges or Supreme Court judges who have been nominated without judicial experience but they all had had substantial practical legal experience in average of 21 years. Elena Kagan had two real years at a law firm.

If you look at Robert Jackson, he had 42 years in practice. He also was an assistant attorney general and attorney general and solicitor general. Louis Powell had 39 years. Louis Brandeis had 37 years. William Rehnquist had 16 years and was assistant attorney general. Byron White had 14 years and was deputy attorney general. Elena Kagan is nowhere in that ballpark.

So if she doesn't have this experience, we need to say, what else can we look to to determine what her judicial philosophy is going to be? And that makes us grasping at sort of straws in her background, her record. But given that those straws are all we have, I think it makes them even more relevant than they otherwise would be because what we need to be concerned about here is she has spent her life as a political operative in the Clinton White House, as an academic, which if anyone's been to law school recently, legal academia is possibly one of the most political environments around in the country, particularly as a dean – it's a very political position. You need to move segments of the

law school administration to achieve different coalitions. It's a very political job. We need to make sure she's not continuing that role of a politician on the bench.

So let's look at what we have in her history to say what would her judicial philosophy be.

When he was at Oxford, she wrote a thesis talking about – it was talking about the exclusionary rule which is a Fourth Circuit rule that has very limited constitutional basis but she was discussion how the rule had changed over time and how different judges had viewed it.

But what this tells us is less interesting about her view on Fourth Circuit jurisprudence but more interesting about her view of what judges do. She asked a question at the beginning of it. Why should judged in their opinions cite cases, cite other laws, cite the constitution? Now, for most of us, that seems obvious. They do that because that's what judges are interpreting. They're interpreting the constitution. They should use reason because that's how we can make a logical conclusion from these things.

That's not the answer she came up with. She said, well, they do it because it gives them a veneer of respectability, because otherwise we wouldn't have any explanation for having a judge in an otherwise democratically elected type of environment. We're going, huh? How is this?

And she concludes her thesis with a very revealing comment. She says – she talks about how judges are coming to the conclusions they want, and she says judges aren't really looking at the law first and coming to their conclusions from there. They're looking at their policy goals first and then using the law basically as a cover to make that policy result look good. Here's a quote from her article: "As men and as participants in American life, judges will have opinions, prejudices and values. Perhaps most important, judges will have goals. And because this is so, judges will often try to mould and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid."

In my view, such activity is precisely the wrong invalid way of looking at the constitution. To approach the Constitution and our law as a way to affect our own opinion, prejudices and values is exactly the opposite of what a judge should do.

Now, granted, she wrote this in 1984, I believe, so this is a while ago, but being that she has not said anything else of merit on exactly how a judge should approach the law since then, it's valid to ask her at this point, is this still your opinion? If you look at her scholarship, she's very careful not to actually take a position on is this case rightly or wrongly decided. She just says, well, I'm just explaining how it is and here's – I'm laying out the arguments. I'm concerned that this could be the track she will take during her confirmation hearings as well that she's just laying out the arguments. But when you're a Supreme Court justice, you're not just laying out the arguments. You are

casting a vote that will create the way the law is moving and so your judicial philosophy is relevant.

There are other aspects in her life that will be relevant whether she had a background or not. Some of these include her treatment of the military on campus as she was the dean. As we mentioned earlier, the Solomon Amendment is a law that prevents schools from receiving federal funds if they're simultaneously refusing to allow military recruiters on campus.

Now, when Kagan became dean, the school had finally agreed to allow military recruiters because they didn't want to give up their federal funds. They had principles but their principles didn't stand up to their pocketbooks. However, the first chance she got, she reversed that policy.

Now, that would be one thing if she had legal grounds for even doing it. You could say, okay. Then you're just disagreeing with her policy of being opposed to this "Don't Ask, Don't Tell" policy. But that's not why she did. She did it in response to a decision in a separate circuit, in the Third Circuit, which does not cover Massachusetts, where Harvard is located, so the legal decision was not in the same area, wouldn't have covered Harvard. It also was a decision that never was put into effect because the Supreme Court accepted the case for review and the Third Circuit said, we're not going to put our decision into effect.

So she said, well, the Third Circuit says the Solomon Amendment has a problem so we'll just go ahead and ignore it and pretend it doesn't exist because now we have some political cover to do so. But there was never any legal cover to do so. She signed onto briefs before the Third Circuit and the Supreme Court with such specious legal arguments that no single Supreme Court justice was willing to accept them.

That says something either about her legal judgment in terms of putting the university in such a position or in terms of her judgment as a political matter or a prudential matter – do we take a position that is legally indefensible because – to gain some political goals for whatever policy I want, in her case, the policy against the "Don't Ask, Don't Tell" policy which she said was a moral injustice of the first order. So that situation I think really highlights the way that Elena Kagan operates.

And we've seen this in some of the Clinton documents that have come out as well. There are many cases in which she's willing to sacrifice something that's legally correct for a political goal.

For example, there is one document regarding partial-birth abortion. She states in the beginning of the document, President Clinton, the Justice Department says this law would be unconstitutional banning partial-birth abortion. Now it turns out, we find out later from Supreme Court cases that it really wouldn't have been unconstitutional. But in her view and in the view of the Justice Department, it was unconstitutional. Her conclusion, as someone who has taken an oath to uphold the constitution, giving advice

to the president who has also sworn to uphold the constitution, she says, sign it anyway. This is a political win for you. You don't want to have your veto overridden so I advise you to sign it.

That's someone who's willing to sacrifice the position in favor of the Constitution for their own political gain or – in this case – for her boss' political gain, not the kind of person we want on the Supreme Court.

So as we see in all of these documents coming out, she's willing to make trades and balance some of her real interests because of trying to get political gain. Now, this has been her modus operandi up until now as a politician. How do we know this isn't going to be the way she goes going forward on the court? We have only her word for it and this is why we're encouraging the senators to make this a real confirmation hearing and really ask her to clarify what her position is on some of these issues, the many issues that we still don't know where she stands on, and to make sure that we are confident she really will be keeping her word.

If you look at what Kagan herself has written about the confirmation hearings, she in 1995 wrote an article criticizing the current method of confirming justices as a farce and a charade because most of the justice nominees stand up there and say, well, I can't answer that question because that might come before the court. Well, I can't answer that question because that might come before the court. She said, you don't need to do that. We should hear about their public policy interests. We should hear about their position on important issues of the day. She listed everything from privacy rights, also known as, abortion, to affirmative action, to – there's a whole range of hot button topics. She said, you can talk about this. You don't have to talk about a specific case that's before the court that you'd be prejudicing yourself on.

The senators really need to hold her to her own words. And if we do that, then we will find out a great deal about Elena Kagan and then the senators will actually have some grounds for voting for her or against her. The president seems to have looked for an inscrutable candidate and that's fine if he thinks that's the best way to go but that doesn't mean we need to let an inscrutable candidate continue that way all the way through the process. This is an important life term appointment to the Supreme Court and America deserves to know who the ninth justice will be. Thanks.

MR. FITTON: Thank you, Carrie. And, Brian, I was going to have you go next but I'm going to go back to my original plan since Curt's here.

MR. CURT LEVEY: I should be punished for being late.

MR. FITTON: We're pleased also – thank you, Carrie. We're pleased also be joined by Curt Levey who's executive director of the Committee for Justice, the premier organization – I'll let others decide whether that's the case – that voted to put constitutionalist judges on the Supreme Court and the lower federal courts. Curt's also a

graduate of Harvard Law School. What's with these – these panels, these courts are all full of Harvard Law School graduates.

MR. BRIAN DARLING: Not me.

MR. FITTON: That's right. You and me, Brian – and with honors and he clerked for the U.S. Court of Appeals for the Sixth Circuit. And he also served as director of legal and public affairs at the Center for Individual Rights which is a pro-civil rights public interest law firm. And he worked on landmark Supreme Court cases there including the University of Michigan affirmative action cases. Then he was over at the U.S. Department of Education's Office for Civil Rights where he headed the Title Nine Policy Group until joining the Committee for Justice. He also, interestingly, has an MS and a BA in computer science from Brown University where he worked in the field of artificial intelligence and developed a patent on a specific type of AI. I'm sure there's a political joke to be made there somehow.

But we're pleased to be joined by Curt Levey who's been doing a lot of hard work on the judicial confirmation fights for several years. Thank you, Curt.

MR. LEVEY: Thank you, Tom. And I only went to Harvard so that I would have standing to talk about how elitist it is.

As Carrie pointed out, Elena Kagan is a nominee without a lot of legal experience. She doesn't have judicial experience. That alone is – in and of itself is not a problem. She doesn't have experience really working as a lawyer either. And when it comes to legal scholarship, which is the one thing you would expect from her given that she was dean of Harvard Law School, there's very little in terms of volume and almost nothing in terms of substance.

Now, you know, that's obviously a concern for the obvious reasons but it's also a concern because that's what makes her a stealth candidate. I mean, there's nothing to go on. At least if she had done something of substance, we could be impressed by it or we could criticize it or maybe even both.

But because she's a stealth candidate, the burden really is on her to prove that she is fit for the Supreme Court in terms of character and judicial philosophy and that makes the documents that have finally dribbled out in the last couple of weeks very important. It's really the only basis that we have for judging what kind of lawyer she's been and what kind of judge she will be.

Unfortunately, half of the documents didn't come out until Friday evening and they were the most important half, the half where she actually was saying something because they included the outbox of her e-mail. Most of the ones that had come out before were just scribbles she made on other people's documents.

Look, I have to give the White House credit. That's a good strategy. I mean, they had six weeks for the story to be written about her before meaningful documents came out. So it's a good strategy for them, bad for the American people, of course, because they have the right to know. She may well be on the Supreme Court for 40 years – she's only 50-years-old now. Stevens served until he was 90, so not too good for the American people.

But, you know, even though they would claim now they've released all the documents – of course, they haven't really – the Clinton Library, or really to be more specific, the representatives of the White House and Bill Clinton who were deciding what got released and what didn't, withheld nearly 2,000 pages from the committee itself. Now, it was more that was withheld from the public but given to the committee, but they withheld close to 2,000 pages from the committee itself for privacy reasons. It's really hard for me to fathom how that many pages could really be legitimately held for privacy reasons, not that we don't all have things we'd like other people not to know but, you know, there is sort of a compelling interest here, again, putting her for a lifetime in the court. So privacy interests that outweigh the compelling interest in knowing, hard to image how there are going to be 1,500 pages. I mean, if there are, that alone says something negative.

So I don't know if it's incompetence, you know. *Politico* pointed out that in one case there were two copies of the same document. One was withheld, one wasn't. It could be incompetence. It could just be a general reluctance to release things, could be something more malevolent – it's really hard to know since they won't say anything more beyond citing privacy. They won't say whose privacy is being protected. So we don't really know – is it being withheld because it's embarrassing to President Clinton or to a third party or is it embarrassing to Kagan, in which case those are the documents we most deserve to have. It may be embarrassing to both Clinton and Kagan simultaneously. One of the things we know she worked on was the Monica Lewinsky scandal. So, you know, certainly, that was embarrassing to Clinton and depending on what she said, it could be very embarrassing to her.

Now, I think there is a fair compromise. I understand that you don't necessarily want these things on the Internet but they can be viewed – for example, what happened during some of the evidence of the – I guess what people at the time called the additional bimbos during the Lewinski standard. There was evidence of sexual harassment but it was viewed in camera, the meeting that the senators – and House members I think had access to it too – had to go into a room and look at it. They couldn't take it out. They couldn't copy it. That would be a fair thing to do with these almost 2,000 pages. Unfortunately, there's not much reasons to expect that – Leahy is going to demand that in the next week before the hearings begin – or that the White House or Clinton would even agree to it.

So what can Republicans do? Well, Sessions mentioned that they could boycott the hearings. That would make a strong statement. It wouldn't stop the hearings from

going on. I mean, Leahy would probably be all too happy to have the hearings without the Republicans there.

However, there is something that Republicans can do in committee and that's they can prevent – assuming Leahy obeys the rules of his own committee, they can prevent her getting out of committee.

There's two rules. All you have to do is look at the Judiciary Committee's website. These rules were just reaffirmed at the beginning of this Congress. Rule three says that you need at least two members of the minority for a quorum before you can conduct business that includes voting a nominee out of committee and then rule four allows sort of a committee version of a filibuster where you need – if somebody objects to ending debate, you need at least one minority member to agree that debate should be ended, that is a vote begun.

Now, Republicans can use either in a principled way. They can simply say, look, part of the normal process is that following the hearing there's always a few rounds of written questions for the nominee. I mean, how do we really know what questions are important to ask if you haven't given us all the documents yet?

Now, you know, once concern is that Leahy can ignore potentially the rules of his own committee. I think that would be somewhat embarrassing to him but he can do it. In that case, Republicans have a procedure available on the floor. They can filibuster. And this would be a principled use of the filibuster. They would simply – they would not be trying to deny her an up or down vote. They would simply be saying, there's not going to be a final confirmation vote on Kagan until we see all the documents. There are Republicans who don't think that you should use a filibuster to prevent an up or down vote. Even they can't object to using it in this way, procedurally to ensure there's a thorough review of her record.

You know, the closest thing we have to a bipartisan standard on how to handle situations like this is the Gang of 14 agreement which conservatives generally didn't like but, again, it's the closest thing to a bipartisan agreement and that says that you can use the filibuster, even a filibuster to prevent an up or down vote under extraordinary circumstances. Well, by definition, you can't know what extraordinary circumstances exist until you've seen the entire record. So, even under the Gang of 14 standard, it's perfectly permissible to say, until we can determine if there's any extraordinary circumstances here, we're not going to allow a final vote.

Now, of course, a successful filibuster would require all 41 GOP senators to stick together which is sometimes hard but I don't think that would that hard here because, again, this is – we're not talking about blocking an up or down vote. We're just talking about procedural issues of fair play and generally you can get even the more liberal Republicans to stand up for fair play.

But, you know, for now we will have to assess her based on what we've seen in the released documents and also the documents from when she clerked from Justice Marshall.

And, as Carrie pointed out, we see a nominee whose legal analysis is colored very much by her liberal ideology and her personal policy preferences. You know, she freely mixes in her legal analysis ideology, personal opinions, policy, all as if there's no difference and no reason to think she's going to be any different on the court. Again, she hasn't had much experience as a lawyer. She hasn't – we'll bend over backwards and give her the benefit of the doubt that she really hasn't had an opportunity to learn that in law you're just supposed to use law. But Supreme Court's not a great place to learn that.

Now, to be fair to her, there are a few examples, especially on religious liberty where she's not just reflexively liberal, where I've been surprised and I've seen she went the other way so maybe she won't be 100 percent predictable. Unfortunately, I think, if you scan everything that we found out, the one area in which she's the most ideological, the most inflexible, in which there's the most evidence that she will be very bad is the Second Amendment. So I want to talk a little bit about that.

Again, that stands out again and again. There's just so many examples where she favored basically gun control over Second Amendment rights. I don't have a lot of time so I'll just sort of quickly give you some examples.

Basically – again, she wanted to bend the Second Amendment to allow gun show regulations, to allow trigger lock mandates. She favored the Brady bill. She tried to help municipal lawsuits against gun manufacturers. She favored a congressional ban on assault weapons that passed. She wanted and executive order banning semi-automatic weapons. She favored the use of executive agencies to push gun safety on people. She was in favor of coercing state and local police to conduct background checks. Even on the fundamental question of whether individuals have Second Amendment rights, which has since been decided by the Supreme Court two years ago, she basically dismissed it and said she was not sympathetic to that argument. She even lumped the NRA in with the Ku Klux Klan in one document, so that tells you how she really feels.

It's no wonder that the thing she was given the most responsibility for in the Clinton administration was gun policy. So given this record and the fact that she ran gun policy for the president that gun owners most despise President Clinton, I'm hopeful that the Second Amendment community will get involved in this fight. They can make a big difference. They were part of the reason that there were 31 votes against Sotomayor who also had a very bad Second Amendment record, although not as bad as Kagan, instead of say the three votes against Ginsburg. And their involvement is important because red state Democrats listen to them. It's not just Republicans who care about gun owners.

So unfortunately, again, this is a good strategy on the part of the White House. Her Second Amendment record has just dribbled out. So that's prevented the gun groups

from getting involved but I think they will get more involved now. I think they will make a difference.

And one thing that's certainly going to remind, not just the gun groups but all of us of how important Kagan is for Second Amendment rights, is the decision that's going to come down from the Supreme Court any day now – McDonald decision in which the Supreme Court will decide whether individual gun rights apply at the state and local level, not just for federal regulations and D.C. regulations since D.C. is a federal enclave. Assuming they rule in favor of state and local gun rights, which I think they will, that's going to complete a very dramatic shift where in two years we've gone from the whole fight over gun rights being in the legislatures, state and federal, to now being in the courts.

And now that it's in the courts, it's sort of like what happened to abortion in 1973. All of a sudden, it's now gun rights in this country are up to the nine justices. And so, every time we're talking about putting someone in the court for a few decades, gun rights are really very much on the line.

And so, you know, that should be good reason for not just the gun groups but for the senators to very closely scrutinized her Second Amendment record and they're not going to look what they see, certainly would like to hear her defend it. I hope she doesn't skirt that issue. And I guess I'd better stop there.

MR. FITTON: Thank you, Curt. Brian Darling of the Heritage Foundation, please.

MR. DARLING: Okay. I think I bring a unique perspective to this discussion. I worked for four United States senators. I did work for the Senate Judiciary Committee when I worked for Senator Bob Smith from New Hampshire in '99 and 2000. So I'm going to try and put a little bit of this into perspective, in a historical perspective.

The Constitution says – the Appointments Clause says in Article Two, Section Two, Clause Two that the president shall nominate by and with the advice and consent of the Senate judges to the Supreme Court.

Now, our founding fathers wrote this as a measure to share power between the president and the Senate. Our founding fathers never envisioned the Senate being a rubberstamp for the president. We hear elections have consequences but that does not mean that the Senate should be a rubberstamp for whomever the president decides to send to the Senate for confirmation.

The clear language of the Constitution allows the Senate the power not to consent to any nominee and no reason is necessary for the Senate to reject the president's nominee. Now, that's important to note that in our Constitution it doesn't mandate that the Senate give a reason for rejecting a nominee and it gives a lot of power to the Senate

to say no. The president has a power to nominate and the Senate has the power to say yes or no. That's the only power they have.

Now, this process started out when Justice John Paul Stevens notified the president that he was going to resign on April 9th of this year. The *Washington Post* reported on April 21st that the president met with Senate leaders from both parties and called nine other senators from the Judiciary Committee as part of the president's duty to get advice from Senate in appointment. Now, the Constitution doesn't say much about advice either, and the president clearly reached out and talked to senators but after that discussion, the president, on May 10th, nominated his solicitor general, Elena Kagan, to be justice in the Supreme Court. So this advice part and getting input from all the senators and the nationwide search for the prefect person to go on the court went all the way to the president's Solicitor General's Office and he decided to nominate her to be in the court.

Now, there's no mandate in the Constitution that the president select a nominee who has experience or even a legal degree. As a matter of fact, I worked for Bob Smith who was not a lawyer. I know that Senator Grassley is not a lawyer. You have non-lawyers that serve on the Senate Judiciary Committee and there's no mandate that you even have a lawyer on the court. But traditions have evolved in the president's criteria over the years on who the president chooses to nominate to the courts. Usually, a president considers a potential nominee's outstanding legal qualifications and reputation for integrity and impartiality before submitting a name to the Senate.

Now, many immediately criticized Kagan for a lack of experience. Elena Kagan does not have any experience as a judge. Elena Kagan does have a year in the Solicitor General's Office, did clerk for Thurgood Marshall, but does not have any of the experience of the current sitting justices.

There's concerns that Kagan may not be impartial because of her record of political activism during her time in the administration of Bill Clinton and as solicitor general.

Now, if you look at the record, the public record on Elena Kagan's work in the Clinton administration, you see activism. You see anti-gun activism, a hostility to the Second Amendment in much if not all of the action she took as a counsel to President Clinton.

So that is very important evidence I think of somebody who's very political and somebody – I remember when this process began there was a discussion of Governor Granholm maybe being nominated to the court, Janet Napolitano maybe being nominated to the court. And I think there was some resistance that I did have somebody who's overtly political put on the court. We've had a tradition of having people with a legal record, with a judicial record as a judge so that individuals can look at that record, can read the record and understand exactly how somebody would serve in the court and what type of analysis they would use.

Now, I did a little research before coming in here and according to CRS, since the first appointment of justices in 1789, the Senate has confirmed 123 out of 158 received. Of the 35 unsuccessful nominations, 11 were rejected by Senate roll call votes. And nearly all the remaining nominees were withdrawn before consideration by the full Senate. So there have been nominees that have been rejected on a vote. There have been nominees that have been withdrawn – Harriet Miers is somebody who was withdrawn in the recent past.

And an evolving part of this nominations process has been the time between nomination and full Senate consideration. There's a background investigation that's done. There's an FBI check. That's private. There's a public – an investigation much of the information is made public. We're seeing a lot of documents being disclosed to the public now about her time when she was with the Clinton administration, some documents when she wrote memos for Thurgood Marshall and some of the work she did in the Solicitor General's Office.

Now, we're in this era of new media and the major media does quite a bit of investigating and they're a very important part of this vetting process. Now, we saw with Sonia Sotomayor, when she was nominated, there was a YouTube video that went out and the quote that spread around early on in her nominations process was when she said, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion. And that shows that the media's playing such a significant role, the new media is playing a significant role in this vetting process.

Now, this vetting process has been going on since the day of her nomination and there was something referenced before about a recent blog post on National Review Online that Elena Kagan during her time in the Clinton administration may have compared the National Rifle Association with the Ku Klux Klan and these are in documents made public by the Clinton Library.

Now that issue is going to come up in the hearing and that's a very important issue and that shows there really is not much information out there to really know what this nominee thinks on many issues. But that does evidence a hostility, a severe hostility to the Second Amendment. And with her activism, anti-gun activism, you take that altogether, this nominee should be held to a higher standard on the Second Amendment. The burden is shifted to Elena Kagan to prove that she's not hostile to the Second Amendment because there's so much evidence, there's overwhelming evidence out there right now that she does not respect the Second Amendment.

According to CRS, the Senate Judiciary Committee was established in 1816 and in 1860 the Senate determined that all Supreme Court nominations should be considered by the committee. In 1955, the nomination of John Harlan marked the beginning of the practice of nominees providing testimony to the committee.

So it's relatively recent that we've had this process in the Senate Judiciary Committee where the nominees come in, they testify, they get questioned. That didn't happen for a long period of our history but clearly it's one of the major portions of this nomination's process. It's how the American people get educated about the nominee and what the nominee thinks. I don't think many Americans are following that closely. Until they actually see the hearing, they get to see and hear the testimony. And we've had some very high profile Supreme Court nominations in the Senate Judiciary Committee that have been followed by the American people.

Now, the confirmation hearings are slated to start next Monday. They're expected to be very important because of the sparse record. We really don't know much. And it's important for the committee to ask very tough questions, probing questions so that the American people are going to learn more and that senators can learn more so they can make an educated vote. When they go down to the Senate floor and the oath of office they took to make sure they don't nominate somebody to the court who's maybe too political for the court, maybe somebody who's overtly a political individual that is not suitable for the court, maybe somebody who does not have the right judicial temperament. We don't know this nominee's judicial temperament.

Now, the committee's made up of 19 members with 12 Democrats and Republicans. As expected, the Republicans are going to ask tough questions. Democrats will respond by trying to rehabilitate the witness.

But I want to bring up one issue that Curt spoke of a little bit and I call it the F word, filibuster. It's something that people don't like to say. It's funny because there's absolutely nothing wrong with a senator invoking his or her rights to extend debate in the Senate. We've had a tradition of filibusters in the Senate over the years. And all a filibuster merely does is extend debate. There's nothing that precludes this Senate majority leader from filing cloture repeatedly to force vote after vote if the Senate really is intent on shutting down debate and confirming a nominee.

But there are a couple of reasons why I think the filibuster is very important. Now, the administration has provided documents to the Senate regarding this nominee's writings as a clerk for Thurgood Marshall, time in the Clinton administration and as solicitor general.

But after these hearings are over, there may be a call for more documents. There may be issues that come up that the Senate really needs to take a look at, some issue that maybe she says something that evidences another activity that she was involved in the administration or at her time maybe when she was a dean of the Harvard Law School or as a clerk that the Senate may want to see more documents and maybe she'll reference something that happened that is not contained within the document.

So in that case, the Senate may want to consider lengthening the process and making sure that they invoke their rights. Now, this is one of my big – (inaudible) – with the way that this whole process works.

You know, this nominee treats this hearing as functional equivalent of a (con ?) law, oral examination, just reciting case law. I'm not giving any personal opinions. The Senate – it's their duty as senators to not allow a final vote on this nominee until this nominee provides some discussion of her philosophy so that Senators can understand what she thinks.

I mean, simple questions like, what do you believe in the right of self-defense? Is that contained within the Second Amendment of the constitution? Are you a liberal, moderate, conservative, progressive? What are your political beliefs? These are perfectly reasonable questions.

And senators just seem reluctant to ask any real questions. It's all a question about a legal issue and then the nominee will recite case law, will never ever mention any personal beliefs. You'd have a hard time getting out of a nominee what their favorite color is because they're afraid to say anything that evidence anything that they believe in and they're terrified of saying that they're liberal or conservative or anything like that. They're afraid to talk about the Second Amendment. They're afraid to talk about the First Amendment and what that means, is it a natural right? Is it just a right recognized by the constitution? What is the proper scope of the federal government? Is the federal government getting too big? I know these questions don't get asked very much but they're very important.

And many have demonized the filibusters as if it's a bad thing but the Constitution authorizes it in Article One, Section Five which states that each House may determine the rules of its proceedings. And the Senate has passed a filibuster rule, it's part of the rules and it's very important.

I just want to close with one other thing that has been referenced – the Kagan and Obama standard. Again, I guess Elena Kagan back in '95 and Senator Obama in 2005 shared my belief that this process was a bit empty with nominees not answering any direct questions. In '95, Elena Kagan talked about the nominations hearings, Kennedy, Soutor, Thomas, Ginsburg, Breyer, and she wrote that – that they rebuffed all attempts to explore their opinions of important principles and cases.

She further argued that, quote, "when the Senate ceases to engage nominees in a meaningful discussion of legal issues, the confirmation process takes on air of vacuity and farce and the Senate becomes incapable to either properly evaluate the nominees or appropriate educating the public." And it's very important that the public's educated. The public has a right to participate in this process. They're not to be cut out of this process. This should not be closed or there should open door transparent all in public.

And Senator Barack Obama stated in 2005, Harriet Miers has had a distinguished career as a lawyer but since her experience does not include serving as a judge, we have yet to know her views on many of the critical constitutional issues facing our country today. In the coming weeks, we'll need as much information and forthright testimony

from Ms. Miers as possible so that the U.S. Senate can make an educated and informed decision on her nomination to the Supreme Court.

Well, senators need to make an informed and educated decision on the nomination of Elena Kagan and if they don't get direct answers, it's their duty to slow down the process and force this administration to provide documents and to force this nominee to show up at the hearing and answer direct questions on her judicial philosophy or the senators will be just rubberstamping this administration.

MR. FITTON: Thank you, Brian Darling of the Heritage Foundation. Let me take a stab at perhaps depicting this nomination in a bit more stark – in terms that are a bit more stark. I think we've all been exceedingly careful and polite in describing it but let me take it a step further – that we have a president that many people believe has put this country in a sort of a crisis atmosphere, that he's running a government that is out of control in its size and its scope.

His attitude in terms of the operations of government are using the White House as – in a way that's just time after time an exercise of raw political power with only a glancing respect for the rule of law as evidenced most recently I think by the shake down, if I could say the word, of British Petroleum, BP.

And we see reports early on with the Kagan nomination, we see that the president was very sensitive about – and this nomination was a little bit closer to the passage of healthcare. So he's worried that healthcare is going to be ruled unconstitutional by the Supreme Court. So, in essence, he goes to a political appointee who has no judicial experience, virtually no legal experience but who's a political person. And so he's packing the court, to the extent he's able, with a politician, just an – as I said, an irresponsible choice.

So this is a sort of – this is placing this nomination in the context of the Obama way of running government I think ought to electrify the Senate a bit more. And of course, the Senate rarely gets electrified other than – and this question I guess goes to your first, Brian, is what does it take to get a senator's attention here?

There are senators who are generally involved with the judiciary process, certainly those on the committee, but it seems to me that when you put someone who violates the law, throws the military off of college campuses, who the Obama people tell the *New York Times* they count on as a vote to protect his legislative legacy, and why senators don't think, well, they need to protect us from that type of nominee is beyond me.

How is it senators can be made to understand the stakes and the issues here? It seems to me, once again, with all the respect to some of those who even – some leadership on the Republican side, even though they get it to a certain extent, they're oblivious to the perception the American people have the way this government's being

run with this Kagan nominee being another example of essentially lawlessness in terms of how to approach governance and certainly the judiciary.

MR. DARLING: I think you're going to see some senators step up to the plate and be very tough on this nominee. I think Senator Jim Inhofe's already been critical; Senator Jim DeMint will be very critical. But on the committee, I think Senator Tom Coburn's going to ask some very tough questions. You're going to see a tough questioning even some of the Republicans that you might think would be leaning in favor of it.

But it does – it's something that does bother me that many of these members of the Senate don't take their oath of office as seriously because to allow this nomination to go forward, as controversial as it is, in the manner that it's going about right now, I think it's almost senatorial malpractice because this really is a battle where you're going to put somebody in the court that's going to have a lifetime appointment. And what do we really know about this nominee? Not much. We do know that this nominee is a crony of the president and it's somebody who is the president's solicitor general.

So I think there has to be a concern on the part of senators that you're just having the rubberstamp on the court. You're going to have somebody on the court who's just going to vote in favor of a lot of the Obama administration policies because this individual's part of the Obama administration now. I think that's a problem.

And I hope during the hearing that this – as this nomination becomes even more important and raised in the public's perception that we see a bigger fight because right now I think you have a lot of senators that are looking at a climate change legislation that may come up; they look at the financial regulatory reform bill which is in conference right now. The Senate's – I don't know if they're ever going to do a budget. Probably not. But they're dealing with appropriations bills and trying to figure out how to deal with the 13 trillion that they've laid on the shoulders of the American people. And these issues for senator they're not important until they're right in front of them.

So we're going to see it be right in front of them on Monday and it will be fascinating to see if these senators take it seriously, step up to the plate, don't get scared of the fact that they're going to look mean to a nominee. I mean, this is something that's very important. They need to ask tough questions. They can be respectful but they need to be tough. And I guess I'm hopeful that something good will come out of this hearing in the sense that the American people will be provided an education on what Elena Kagan believes.

MR. FITTON: Carrie, are you – what's your view on how things are going and how they ought to be going?

MS. SEVERINO: Knowing as much about her as – you know, who would vote for her for a four-year term as president? It's amazing to think we'd vote for her for 40 years or this Senate would. The fact of the Constitution puts the Senate in this process,

says that this is supposed to have a representative branch of government involved, not just be something that's done in backroom deals, which is the way the president seems to prefer to do things and not something that's insulated from the people, because the judicial branch is insulated. Once you're in, you're in. And there's no other way to deal with that. So we need to have the representation right now.

I would just going to – coming off some of Tom's comments – point out what is Obama's standard here and why was he choosing her? You pointed out that when you talk about Harriet Miers, Brian, that he was in favor of someone with judicial experience or at least with a very clear opinion on things, that's not his opinion that he's going for.

We've also heard him say he wants someone who has empathy and who will identify with the little guy and kind of – I guess, put a finger on the scale of justice for the little guy. Even that you sort of wonder what he's thinking with Elena Kagan because here's someone who grew up on the Upper West Side, who spent her entire career inside the beltway, in Hyde Park, in Harvard Square – not exactly the little guy.

So the only other time he's explained what he wants in terms of a judicial nominee was actually a few weeks ago when he was on Air Force One, he was complaining about what he referred to as conservative judicial activism by which he meant judges who are willing to overturn unconstitutional laws that Congress puts forth. So what he wants is someone who will give Congress a pass.

Now, this is no surprise. He, I think, sees his legacy as this huge legislative agenda that he's managed to encourage the Democratic Congress currently to push through and push through in many cases without giving it very much thought, without necessarily even reading the bills. I think Elena Kagan is another bill that we're going to get passed without reading if the Senate doesn't step up and try to do something about this.

And if we look at her one – you mentioned, Brian, we know what she thinks about is the federal too big. Actually, that's something we knew. Her one major law review article on presidential administration, she argues for enhanced presidential power. Some people confuse this with her being maybe conservative. Maybe she believes in the unitary executive, which was a big Bush thing. Not at all.

She believes the president should have more power because that will help him more effectively manage the expansive regulatory state which she sees as the only downside to regulation is often times can become inert and not do enough. I think that's exactly the opposite. We don't need a government that is reaching out even further into the American life. We already have seen a government that's taking unprecedented steps in control of private aspects of American lives. We need a government that's going to step back.

Elena Kagan doesn't see a problem with that so I think if the president's looking for someone who's going to give the go ahead to his healthcare plan, his bailouts, cap and trade, whatever he comes up with next, I think he probably has found a good candidate.

MR. FITTON: Well, certainly, the complaint about judicial activism is a bit silly given the fact his most recent nominee, now Justice Sonia Sotomayor, voted to overturn the laws of 37 states in the United States Congress in throwing out life sentences for juveniles, for certain juvenile crimes to include rape and attempted murder.

MS. SEVERINO: And interestingly enough, Elena Kagan, despite her role as solicitor general, which she assured the senators she would be defending every single federal law, did not file a brief in that case. Federal laws were overturned by that decision. She decided not to file a brief in that case. Sonia Sotomayor, who also swore to the Senate Judiciary Committee she would not be basing her decisions on international law, based – signed on a decision which was based in part on, well, other countries don't do this. We shouldn't do it too. So it makes you wonder how seriously we should take even their statements to the Senate Judiciary Committee.

MR. FITTON: So how do we electrify the Senate, Curt? You know, I talked a little bit about the tea party. Have you detected any movement there that – I'll be speaking next month at the Tea Party Convention in Las Vegas – but have the other groups started making moves that related to the committee – the confirmation?

MR. LEVEY: Frankly, I've been disappointed. I think this is a natural issue for the tea party folks. I mean, they disagree on a lot of things but the one thing they all seem to agree on is that the federal government has outgrown its – or should say exceeded its constitutional scope. Unfortunately, there's only one body in this country that can do anything about that and that's the Supreme Court. So you think they would care.

You know, part of the problem sometimes is that to some degree, the courts are everyone's second issue. They care about abortion or they care about healthcare. And a lot of times they don't realize what's happening in this country, that least for the last several decades, that most of those issues are decided by the courts, whether we like it or not. I mean, that's why I'm hopefully about the Second Amendment groups getting involved for purely political reasons – senators listen to them, senators on both sides of the aisle.

Look, you know, I'd like Republicans to do the right thing here for principled reasons but if they won't do it for principled reasons – and I'm not predicting they won't – but if they won't, there's the political reasons as well. Pretty much everyone agrees that judges are an issue that cuts in Republicans' favor because it involves a lot of sort of the culture war and war on terror issues in which Republicans typically have a 60-40 or 70-30 example in the polls.

Even liberals will concede that, you know, it's an issue that cuts in the Republicans' favor. They'll explain why it shouldn't but they'll concede that politically it does and especially in the swing states. I mean, no, in New York, I'm not sure the judges issue is going to help Republicans. But in the swing states, clearly, it does especially because it helps to highlight the sharp contrast between how a lot of these red state Democrats vote in Washington versus the value of their constituents.

I mean, you know, if there's anything we know about Kagan, we know she's anti-military. We know she's anti-gun. We know she feels very strongly about a gay rights agenda so much so that in a couple of gay rights cases as solicitor general she didn't even fulfill her minimal duty of defending federal law.

You know, whatever you think of those issues, I'm pretty sure that in, let's say, Arkansas, for example, most people are not anti-military and most people are not – do not believe in a radical pro-gay rights agenda and they're not anti-gun. So let Blanche Lincoln choose – does she want to vote with the values of her constituency on the Kagan nomination, or does she want to vote with the values of the far more left part of her party.

So again, I think just putting Democratic senators and Senate candidates in the position of having to choose is very useful to Republicans. So even if there's no principled reason to raise the visibility of this nomination, Republicans have plenty of good political reason to do it.

MR. FITTON: So Brian, practically speaking – I disagree with you on the filibuster, at least to prevent an up or down vote, not to delay a nomination. But in the end, practically, if Ms. Kagan's nomination is to fail it's because she loses the support of Democrats, not of Republicans. Is that an – because I say that as if it's true. Do you think it's true?

MR. DARLING: Yes. Clearly, the only way this nomination doesn't pass or even if a filibuster would be sustained to push the process for an extra few weeks, it would take the support of Democrats. I mean, I don't think – I mean, you could conceivably hold the caucus together but I don't think it's likely. I think you'd have to have some sort of a whittling away of Democrat support for that to even get to that stage, even to hold the Republican Caucus together on a filibuster vote.

I think the Second Amendment issue is so important also because that's an issue that crosses party lines. If you look at the Senate votes on Second Amendment issues over the past two years, overwhelmingly these issues have over 60 votes and very strong Democrat support. You have a very strong Second Amendment caucus in the Senate – it's bipartisan – and you pretty much can pass Second Amendment legislation in the Senate.

Now, ironically, you have a president who claims that he respects the Second Amendment but he's nominated two individuals to serve in the Supreme Court that have an open record of hostility to the Second Amendment. I mean, Sonia Sotomayor wrote in

a Second Circuit Court of Appeals case that she did not believe that the Second Amendment should be incorporated onto states and she did not recognize the Second Amendment in that case. I think that was evidence of a hostility to the Second Amendment. I don't think she did anything to refute it in the hearings. She was asked in the hearing if the individuals have a right to self-defense and she couldn't answer the question as if she's never thought about the idea that the Second Amendment is there for self-defense, it's there, and it recognizes a person's right of self-defense.

And then you have Kagan and which, as has been mentioned before, she wrote as a clerk to Thurgood Marshall that she has no sympathy for a defendant who claimed a Second Amendment violation, with no legal analysis at all, just her personal opinion. I have no sympathy for it – which many people how have clerked for judges have told me they would be thrown out of chambers if they ever handed that memo to their boss. It's just over the line. And then, further evidence, you move on to her time in the Clinton administration, very long list of activities, gun control activities and then she failed to file a brief as solicitor general in the Chicago gun case.

So issues like that may whittle away some support. You may have Blanche Lincoln or others in the Senate or Jim Webb or Virginia, others that are strong Second Amendment supports that look at this nominee and say, Mr. President, why couldn't you nominate somebody at least who has no record in the Second Amendment instead of some two nominees who have open hostility to the Second Amendment because it will hurt them. It's going to hurt Democrats as a whole if they continue to support these nominees that do not support the constitutional right of all American to keeping bare arms.

MR. FITTON: Carrie, one more question to you before I open the floor up to questions. You would think another issue that crosses party lines is support for the military. And there are these new documents that just came out from the Department of Defense that I thought were rather extraordinary. I reviewed them last night. I guess they were distributed or highlighted last night.

But the idea that you had a law school dean encourage her market there, her students at Harvard to protest, not just when they show up, I want you to – she didn't say it in so many words – she did say it in so many words but she said she wanted them to be protested when they showed up. And, obviously, you have the right to protest but certainly you don't have the right under the law, as it currently stands, to throw them off of campus, the military recruiters.

These documents document how the Defense Department was outraged by the misconduct here by Ms. Kagan and her attack on the military. These documents document an attack by Ms. Kagan on the military not just her – assuming you don't think throwing them off the campus is an attack but her encouraging others to attack it is documented in her own words in these new documents.

Why isn't that issue generally not given more play? We know why it's not given more play by the liberal media, but don't senators in your contacts with them and their staff – aren't they sensitive to this? Is Washington so out of touch – and I mean Republicans and Democrats – that this ought to be a non-starter for a nominee?

MS. SEVERINO: Well, the amazing thing is that we're hearing a complete misconstrual of what really happened here. If you look at what Senator Leahy said, oh, we've got these Department of Defense documents now. It shows that Elena Kagan obeyed the law the entire time. And you're going, what documents did you read? It doesn't say that at all.

These are Defense Department documents complaining about the problems with trying to deal with recruiting in law schools, specifically singling her out actually. They called all of the law school deans these saber rattlers who are trying to incite problems against the military, and even singles her out because she had specifically encouraged students to protest.

So one of them explained that in the past 12 years at Harvard when we haven't been on campus we only had nine recruits; in the 16 months that we were allowed at campus, we had four recruits. So obviously it makes a difference.

Senator Leahy is trying to portray this as, oh, the military was allowed on campus the entire time. Well, no. They weren't physically evicted from the campus but it was left to the Student Veterans' Association which was – originally was supposed to be just a social organization, to organize any military recruiting on campus. That's laughable in comparison to the authority of the school's Career Service Office which has all the staff and resources necessary to facilitate an entire well-organized and well-run interviewing process where all of the other organizations are part of one cohesive process.

MR. FITTON: Were you at Harvard when she was there?

MS. SEVERINO: I was. I was. I was at Harvard when she became dean so our first year a few friends of mine had her for classes and then she was dean thereafter. One other interesting thing is that she chose to single out the military in her complaints about "Don't Ask, Don't Tell." So this was arguably a concern over, well, we want to represent all of our students on campus. We have gay students on campus. We have a non-discrimination policy. So as a dean representing these students, I have to take the stand.

First of all, it says, okay, so when you're faced with choosing to support the veterans and the students who are interested in the military versus the gay student groups, I see who you've chosen. You've chosen the gay student groups and that came up again when Curt mentioned her religious liberty things that she has a relatively more neutral opinion of religious liberty but there is one document that came out that said – where she said, I'm a fan of this act that protects religious liberties but when it comes to the gay rights groups, we don't want to make a big deal of it because they're going to scream and

yell and we can't afford that. So she obviously – a lot of her positions stop when it comes to angering these groups.

But the interesting thing is that even though the military has nothing to do with this policy, it was passed as a federal law by Congress and signed by the president that she worked for, President Clinton, so the military cannot change this policy. Only Congress can change it at this point. She decided to punish the military for that.

Well, simultaneously, not having any issues with, for example, accepting money from Saudi Arabia which has a decisively stricter policy against homosexuality, death versus being evicted from the military. Okay. I can see where you could have some civil rights concerns about the laws of a lot of these nations that have Sharia law.

And she never said, well, President Clinton can't come to speak on campus because he signed this terrible piece of legislation that is a moral offense of the highest order. No. Did she ever tell a senator he couldn't come and speak on campus because he had participated in this kind of moral offense of the highest order? No. She decided to take it out on the military itself.

So that really says something about – is she just trying to make a political play here or is she really actually concerned about the issue? I think she has more issue concerned with in scoring some political points and not really with doing anything that had anything really to do with the issue.

MR. FITTON: She wanted to be president of Harvard Law School. It's been well reported.

MS. SEVERINO: Right.

MR. FITTON: I'm sure taking that position vis-à-vis the military no matter what the law says, she was thinking about internal Harvard politics rather than the rule of law and now she needs to be held to account for her political stance. Curt, you wanted to add something briefly.

MR. LEVEY: Yes. I should point out not only didn't she complain about President Clinton instituting "Don't Ask, Don't Tell," she worked for him for four years after he instituted that policy.

MS. SEVERINO: She did not resign in protest.

MR. LEVEY: Very strange. And you pointed out the fact that Harvard University took that $20 million grant from somebody who's a big promoter of Sharia law and some of that money goes to the law school.

But you know, also, she claims they're just enforcing their own – there aren't discriminatory employers on campus. They allow law firms, the big law firms very

proudly discriminate. They're almost surely in violation of at least Title Seven with their open preferences for minorities, to some degree women and gays. So again, it's a very selective outrage.

I also just wanted to add the point that when it comes to red state Democrats, whether it's Webb or Lincoln or whoever, it doesn't take a lot. If you look at two of Obama's legal nominees, Dawn Johnson to the Office of Legal Counsel and then Craig Becker to the NLRB, they were both defeated with just really a couple of red state Democrats making is clear they couldn't vote for them. Now, Becker was recess appointed but nothing we can do about that. Kagan will not – I wouldn't mind. Let her serve one year. Maybe that's a fair compromise. I'd better stop.

MR. FITTON: Well, let me open it up to the floor here and we have a microphone so if you could wait for the microphone before asking your question and please if you can identify yourself as well. Thank you. Go ahead. Right up here. I'm sorry. Thank you.

Q: I wanted to come back to some of the remarks you had about the healthcare bill and how this nomination is going to play into that. I know, or at least I learned when I read the Heritage Foundation's *Guide to the Constitution* that Congress has a very limited power to spend money and yet, when I go to my paycheck every two weeks, I see there's money taken out for a health insurance program that according to *The Heritage Guide to the Constitution* is unconstitutional. There's money taken out for a pension program. That's unconstitutional. So is this something that Kagan should be asked but should we reject nominees who believe that Medicare and Social Security are constitutional?

MR. DARLING: Well, what we should ask these nominees is specific questions on the mandate and do you think that a national mandate that forces all Americans to buy a product in private commerce is – other constitutional concerns about that. Is that something that our founders thought about when they wrote the Taxing Clause and the Commerce Clause of the constitution? These are reasonable questions and obviously you're taking it to the extreme.

But hey, ask that question too. I'm all in favor it. I'd love to hear her opinion of it and justify it and I'd love to hear her say her rationale for it. I'd love to hear any opinions come out of her mouth on what her judicial philosophy is because I bet you're not going to hear them.

I think you're going to see a nominee stonewalling in the same manner that she criticized in her 1995 op-ed. I think you're going to have a nominee that would never answer the question that you asked me, will never answer a question about the individual mandate and even if there are constitutional concerns, and I think you're going to see this nominee even dodge simple questions about the Second Amendment and simple questions about judicial philosophy, about activism versus a restrained view of the

constitution, whether we have a limited federal government or an expansive federal government.

I just hope this nominee answers some questions so the American people can understand and senators can understand what she thinks.

MR. FITTON: Do we – go ahead. You can follow.

Q: If she does disagree with you, if she answers yes, I disagree with *The Heritage Guide to the Constitution*, I believe that Medicare and Social Security are constitutional, should senators vote against her?

MR. DARLING: If she actually answers questions forthcomingly and states her judicial philosophy and if these senators don't agree with her philosophy, then they should vote against her. I mean, part of what's going on here, the exercises, one, you need to know what the nominee thinks and what the nominee's philosophy is and that's stage one.

I think that the Senate should consider filibustering a nominee if they don't get answers to the question is a matter of separation of powers. I don't care if it's a Republican or a Democratic president nominee. I think that as a matter of separation of powers, if a nominee sits before that committee, doesn't answer questions, they should be filibustered until they answer questions. I think that's perfectly reasonable. And thank you for reading *The Heritage Guide to the Constitution.* (Laughter.)

MR. FITTON: Carrie or Curt, do you know – because the Obamacare issue, there are lawsuits challenging individual mandate among other claims over the – it violates the Commerce Clause of the constitution. Do you know if she's expressed a view while at the Justice Department on this? Because if she did, there's a strong argument she ought to recuse herself but we need to remember there's nothing to mandate her recusal. It's her judgment in the end over whether she recuses herself, whether or not she promises it under oath because the only thing to hold her accountable would be to impeach her if she sort of participated in cases that she had a role in as an Obama Justice Department official. But do we know she's had a role in evaluating the constitutionality of Obamacare?

MS. SEVERINO: It's entirely possible that the president could ask his solicitor general what she thought about it. We don't know that yet but I think that would be something that would be interesting to ask during the nomination hearings of, don't just say what your advice was to the president. Just say, here's some issues. Did you give the president advice on this issue? That we way we know going forward, okay, this is something she should be recusing herself on.

But we actually do have some insight into her views in the Commerce Clause from the Clinton documents. We can see in two different documents she criticized Commerce Clause cases, specifically *U.S. vs. Lopez* and *U.S. vs. Morrison.* Now those

are two big cases that actually started a pushback on this expansion of the Commerce Clause. The Commerce Clause says that – it's kind of this loophole through which the government seems to want to get involved in everything. So this has to do with interstate commerce.

And on those two cases, the Supreme Court pushed back and said, you know what, this isn't interstate commerce. A gun that has never traveled from one state to another actually isn't interstate commerce. Violence against women, which is a terrible thing, but if it happens in one state, it's just not interstate commerce. It's not commerce and it's not interstate. So how is it interstate commerce? She criticized both of those cases.

So if she doesn't approve that the government has any limits, which I think it's kind of where it goes, if you can't get down to the fact that even something will be traditionally a state police power kind of thing like violence against women, then I don't know where you find actually limits to the Commerce Clause.

MR. LEVEY: Unfortunately, if she has done, said anything specifically about the individual mandate, it's probably while she was SG and that hasn't even been where our focus is. There probably are legitimate privilege reasons why those documents couldn't be released. I mean, we're just trying to get the Clinton documents for which there are not legitimate privacy concerns at which point the individual mandate was still just a dream in the left's eye.

I should point out – well, in terms of her hostility to federalism, the idea that there are limits on federal power, she also basically plotted a way to get around the Printz decision which was basically where the Supreme Court said you couldn't force state and local police to do gun background checks. And she was plotting, well, you know, maybe the president can get around it this way and that way.

So we have a lot of evidence that she's not a fan of federalism, that she basically does think the federal government has limitless power and that's a scary notion even if you don't care about Obamacare.

MR. FITTON: Well, let's be clear here. The Obama administration has said that Elena Kagan will only recuse herself on those cases in which she's a named counsel, where she has signed on to the brief or has litigated a little bit in the courts. So cases – but legal ethics, if you're a regular judge, would mandate recusal in a far greater range of cases including cases which she analyzed and gave even informal advice to her colleagues in the Justice Department or the White House.

So already the Obama White House has laid out an unethical theater for recusal for Justice Kagan, if she does become justice. And as I said, there's no recourse under the law. We had a – there was an issue in a case that we had over Justice Scalia. We did not think his recusal was required but it was clear in that case that he was the judge of whether he should be recused or not.

So they're putting out there standards for recusal that are not appropriate which means they're hiding something and that she is involved in a lot more cases than they want public to know about and they know what her views are and, as I said, she's a political plant on the court to protect his legislative agenda or so I say.

MR. LEVEY: You know, what's really scary is she probably won't recuse herself from either the Defense of Marriage Act case or the "Don't Ask, Don't Tell" case that's currently in the courts if it does get to the Supreme Court. On "Don't Ask, Don't Tell" her position couldn't – there is no American who has expressed more hostility towards "Don't Ask, Don't Tell" than Elena Kagan. And the Defense of Marriage Act case, not only did she shirk her duty as solicitor general in not putting up a defense but she basically said it was a horrible law in the brief. And I don't know that she's going to recuse herself on those either. So you know, there's a whole bunch of conflicts of interest coming up if she's confirmed.

MR. FITTON: Any other questions, comments? Yes, right here, blue shirt in the center.

Q: Lou Dubose with the *Washington Spectator*. Mr. Levey, you cited the Lewinsky documents dump in the (floor building ?). That was a fairly low standard. It was rejected by Judge Starr. There was evidence in that that was admittedly hearsay, the Lewinski material on the floor building. Chairman Hyde said only the Judiciary Committee would see it. Tom DeLay opened it up to the entire public in conference. I mean, that is – what's your standard regarding release of documents?

MR. LEVEY: I'm not quire sure what your question is, but what I was trying to say was that, okay, I understand you don't want to release these documents to the public and press. Okay, you don't want to even release them to the Judiciary Committee. How about a compromise in which we allow senators to view in camera and that's where I was making the comparison that was certain of the Lewinsky related documents. The compromise was to allow senators to view it in a room where they could not take it out or make copies. That's why I brought that up.

MR. FITTON: But the ultimate decision to release documents resides now with President Obama personally. Bill Clinton has a say, obviously a big say. So the two people withholding documents – the two people responsible of withholding documents from the Senate Judiciary Committee are President Obama and President Clinton, you know, two – obviously their interests are not necessarily the interests of the American people and certainly it's not on the side of transparency at this point.

Brian, how does it work in the Senate? Describe how these documents would be handled of a confidential nature in the Judiciary Committee?

MR. DARLING: I mean, they deal with this issue quite a bit. For example, the FBI background check, that information is shared with senators – staff that don't have

clearances are not allowed to be part of those discussions. They do have a room over in the Capitol for documents that are classified or sensitive in some nature that they can go review.

So there is a process by which this administration could provide documents for senators' eyes only. It's perfectly reasonable to do. It's something they've done in the past and they easily could do so under these circumstances.

And this seems to mandate that type of disclosure by virtue of the fact that, again, not much is known about her. I mean, there's no real wealth of a public record on her beliefs. So it's important for these senators to get all the information they can about her time in the Clinton administration and hopefully this administration, the Obama administration is not hiding documents from senators.

MR. FITTON: Any other questions? Yes, right here.

Q: I'd just like –

MR. FITTON: We have a microphone. Use the microphone please. Dana (sp) has it there for you.

Q: You folks have done a good outline today where things are and some of the history in the past. We're coming down to home front. Many years I've been in a situation working for trade associations pushing that button when it has to be pushed. And what way can we – and particularly Brian – what's the temperature of a lot of staffers on the Senate – in the Senate that you're dealing with in reference to trying to open up these documents that have just been released over the weekend and then purposely probably by the administration so late? And this is a big frustration I see at the table today.

I think the key thing is – I know we have credible organizations in front of us, how do we get that – push the button out there as we proceed next week and before next week? Go to your websites and – the factor is we can convey our caution marks right now but the concern I have is the factor how do we mobilize all the individuals out there to hit the button when they have to?

MR. DARLING: Just to be clear, Heritage Foundation is a 501(c)(3) organization so we're an educational institution so we don't do calls to action. But what I will say is two things. I think the temperature is high. I think you have staffers that are very upset and senators that are upset that they've been dumped a massive amount of information in a short period of time. They just don't have the time to digest this. I mean, we're talking about huge stacks of documents and many of which are on the Internet and you can access yourself. But this is a lot of information to be put on senators in the days before the hearing. They don't have time to digest all this, read all this. And we don't know if there's information that's missing.

And two, I think the American people have a right to participate in this process. That's our democracy is all about. It's a very elitist scenario we have right now and process that we have right now where you have senators having the hearing and they get to have one-on-one meetings with the senator which are private.

But the American people really have a right to participate. And I think that with this new media age we're in, people can get information quickly. They can participate in the process in the sense of going online and reading many of these Clinton administration documents – that's good.

But I really think that this process needs to take a little bit more time so the American people can have time to get up to speed on what's going on, to understand some of these complex issues. We're citing case law here and your average American needs to take some time to understand and put that in context if they're not a lawyer.

So this process should be drawn out in the manner in which the American people are allowed to significantly participate in a process that's going to end up with an individual in the Supreme Court who could serve there for 40 years.

MR. FITTON: So the hearings begin on June 28th, which are relatively soon. Obviously, they're rushing the hearings in order to get the nominee voted on before the August recess.

So when – to be clear, it is a 12-seven split in the Senate Judiciary Committee so there are 12 Democrats and seven Republicans. So you can count the numbers there as the likelihood of stopping her in committee. Once it goes to the Senate floor, obviously there will be a few more weeks.

What is the timing, Carrie or Curt – whoever knows – what would be – what do you understand to be the end date for a vote, full vote at the Senate?

MR. LEVEY: Well, certainly, as you say, they want to do it before the August recess. I mean, what's the last day? The 7th or so of August? It's a little bit early this year. Again, there are things that Republicans could do to slow it down, the committee vote – and we've already talked about the filibuster but let's say that doesn't happen.

You know, Leahy will have to allow a week or two for a couple of rounds of written questions after the hearings end, then he'll put it on the agenda as soon as he can so for the next week Republicans may or may not use the sort of automatic one-week delay. Once she gets out – and so that could be close to four weeks depending on what the Republicans do.

Once she gets out of committee, they can have vote. They probably won't do it the next day but they could certainly within a little more than a week. They don't have to allow more than a couple of days for debate. So the way it's going now, they shouldn't have a problem confirming here before the August recess.

But you know what? I certainly understand they don't want this to go into September. Again, this is not an issue that works in their favor. They don't want to get in close to the election. But worse come to worse, you know, stay a little later in August. They're taking a very long break this year. They're not coming back because Labor Day isn't until what again, the seventh or something of September? So I don't think they get back until around the 13th? They don't really need close to six weeks. Let them take four weeks for August recess. So if they don't want this to drag into September but they want to give us enough time, let them go out in mid-August instead.

So there really is no – the point I'm trying to make is there really is no problem. If they want to take more time on this, they can.

MR. FITTON: Well – go ahead, Carrie.

MS. SEVERINO: I was going to point out that this again is – this is someone who's going to be on the court for three decades or more. If you're worried about missing a week of vacation to rush things through, that just doesn't make any sense.

And I just wanted to point out that we do have ways. You can contact your senator through our website, judicialnetwork.com. And I think contacting senators in the Judiciary Committee, even if that's not your senator, just particularly the Republican senators so they know that people are interested in this issue and care and want to see them really stepping up and making it a real hearing. Call the Democrats too. See if they'll answer your phone. And call your senator particularly around the vote because it's one thing for us to get up here and say, people care, this is important, but if they're not hearing it from actual constituents, then they doubt whether we're just the ones that are trying to make a big deal out of it.

MR. DARLING: Just to be clear about the Senate role. This is not like a piece of legislation. Once a nominee is discharged from committee, goes in the executive calendar, you can't filibuster a motion to proceed. It's not like legislation that would take a long time to get done – basically, if the majority leader wanted to shut down the – if they filed cloture on the nominee and that would take two days and change. So it doesn't take as long as a piece of legislation to shut down debate.

But the one ironic thing is what's happened quite a bit with this Senate Majority Leader Harry Reid is he likes to file cloture before a nominee has any debate. So maybe that will happen in the circumstance to further constrict debate.

MR. FITTON: You know, what occurs to me – to close it out – you never know what's going to happen in politics. It seems to me the breaking news today on the comments by General McChrystal in the *Rolling Stone* magazine and the fight now that Obama is going to be having with the military, whether he's being too harsh on McChrystal – I don't even know what's happening but I'm assuming it's going to be a military versus President Obama type of analysis that politics will – that will be the type

of politics that happens over the next few weeks. And then you're going to have a judicial nominee that's also seen as being anti-military.

So I don't know if the politics or this have been settled as much as the major media would like people to assume that this McChrystal story I think may impact the approach certain senators have in terms of how they treat and categorize Ms. Kagan's attack on the military while she was at Harvard Law School in violation of the law.

So with that being said, sorry we don't have enough time for all the questions out there but we are limited and we appreciate your participation. This will be available on the Internet. Obviously, it was available live but it will also be available via YouTube and all of our folks here are on the Internet as well. I'll let everyone detail their websites one more time.

MR. LEVEY: Just committeeforjustice.org.

MR. DARLING: Heritage.org.

MS. SEVERINO: And judicialnetwork.com.

MR. FITTON: And we're at judicialwatch.org. Again, thank you for your time. Have a good afternoon. (Applause.)

(END)