CENTER FOR REPRODUCTIVE RIGHTS

Legal Analysis of Solicitor General Elena Kagan's Record on Abortion Rights

The Center for Reproductive Rights promotes women's equality worldwide by securing reproductive rights as constitutional and international human rights. We extensively litigate in state and federal courts, including the U.S. Supreme Court. In addition to our U.S. work, the Center brings groundbreaking cases under international law before the United Nations and regional human rights bodies.

As a matter of policy, the Center does not take positions supporting or opposing judicial nominees, including nominees for vacancies on the U.S. Supreme Court. However, we do analyze the records of nominees for the Court to ascertain their support for abortion rights and reproductive rights more generally. In light of the recent nomination of Solicitor General Elena Kagan for the U.S. Supreme Court, we reviewed the nominee's written materials as they have been made public, and present our analysis below.

It is crucial that the Senate fully explore Kagan's — and any nominee's — judicial philosophy on this issue. Ultimately, reproductive rights are essential to ensuring justice for all members of society — women, children, and their families.

Achieving a clear understanding of Kagan's views is critically important in light of Justice John Paul Stevens' role as a leader in protecting civil liberties and equal rights. Joining the Court after the landmark decision in *Roe v. Wad*e (1973), Justice Stevens understood that a woman's right to access abortion services is fundamentally tied to both her dignity and her right to protect her life and health.

In *Planned Parenthood v. Casey* (1992), Justice Stevens would have struck down as unconstitutional Pennsylvania's 24-hour waiting period and biased counseling requirements. In *Harris v. McRae* (1980), Stevens dissented, arguing that the Hyde Amendment — which prohibits Medicaid from covering medically necessary abortion services for poor women — is unconstitutional. Most recently, in *Gonzales v. Carhart* (2007), he joined a dissent by Justice Ginsburg that found the decision "alarming" for ignoring established constitutional law and upholding a ban on abortion methods without an exception to protect women's health.[1]

The Court eroded protection for abortion rights in its most recent abortion rights case. In the last legislative session, over 500 anti-choice bills were introduced. In the past year, the Center for Reproductive Rights has filed suit against a host of new state restrictions on abortion; some of those cases may eventually reach the Supreme Court. Now more than ever, it is paramount that the Supreme Court provide strong and clear direction on the constitutional protections afforded the right to abortion. We encourage the Senate to engage Solicitor General Kagan throughout the confirmation process on these issues, and hope that if she ascends to the Court, she will stand as firmly as Justice Stevens did in defense of the constitutional right to abortion.

Summary of Findings

The following analysis of Solicitor General Elena Kagan's record is based on a review of publicly available documents, including her memoranda while serving as a law clerk to Supreme Court Justice Thurgood Marshall, her recently released notes and memoranda while serving in the White House, her academic writings, and her statements upon nomination for the position of Solicitor General.[2] Those documents shed light on Kagan's views in four areas: access to abortion services and funding for incarcerated women; protections for women's health in restrictions on later-stage abortions; restrictions on physicians' ability to counsel their patients about abortion; and the general state of abortion rights law.

Kagan's record documents her agreement with the general proposition that the Constitution affords a right to abortion. Her positions on the specific contours of that substantive right are less discernable. Indeed, some of her writings raise questions about the depth of her consideration of the significance of reproductive rights to women's health, lives, and equality. That said, only speculative conclusions can be drawn from the record given the limited, and at times political, purposes for which the memos at issue were written, and the length of time since she authored them. Accordingly, it is critical that the Senate inquire into her current views on constitutional protections for abortion rights more deeply through the confirmation process.

In-Depth Analysis of Kagan's Abortion Rights Record

I. Prisoners' Right to Access Abortion Services in a Third Circuit Decision Presented for Supreme Court Review

In a *certiorari* memorandum written while working as a law clerk to Justice Thurgood Marshall, Kagan expressed skepticism about whether the Eighth Amendment protects the serious medical needs of incarcerated women seeking abortions.

In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), female inmates in Monmouth County, New Jersey, sought a preliminary injunction enjoining the County from requiring inmates to obtain court-ordered releases and their own financing in order to receive abortion services while incarcerated.[3] Inmates seeking an abortion were told that the County would only provide abortions "where a medical emergency presents a life-threatening situation to the mother."[4] However, on appeal, the County "modified its characterization of its policy to permit all 'medically necessary' abortions, thereby including those that endanger the health as well as the life of the mother."[5]

The district court concluded that the plaintiffs were likely to prevail on their Fourteenth and Eighth Amendment claims. The Third Circuit Court of Appeals agreed, and upheld the lower court's injunction, instructing the County to cease its practice of requiring court-ordered releases, to "provide the necessary transportation to an appropriate medical facility for those inmates seeking an abortion," and to "assume responsibility for insuring the availability of funding for all inmate abortions."[6]

On the inmates' Eighth Amendment claim, the Third Circuit held that termination of a pregnancy is a "serious medical need," which may be determined "by reference to the effect of denying the particular treatment."[7]

> [T]he seriousness of the medical care needed to terminate a pregnancy — notwithstanding the fact that the choice to do so is constitutionally protected — is evidenced by the effect of the denial of such care. . . . [I]t is evident that a woman exercising her fundamental right to choose to terminate her pregnancy requires medical care to effectuate that choice. Denial of the required care will likely result in tangible harm to the inmate who wishes to terminate her pregnancy. . . . An elective, nontherapeutic abortion may nonetheless constitute a "serious medical need" where denial or undue delay in provision of the procedure will render the inmate's condition "irreparable."[8]

The County petitioned the Supreme Court for *certiorari*, or review of the case, appealing the Third Circuit's holding on the Eighth Amendment claim that the County's policy constituted deliberate indifference to the inmates' serious medical needs.[9] The Court denied the petition.[10]

As a law clerk to Justice Thurgood Marshall, Kagan authored a two-page "cert memo," recommending that the Justice vote to deny the petition and let the Third Circuit opinion stand.[11] The effect of denying Supreme Court review was to preserve a strong opinion protecting the right of incarcerated women to get abortion services. Justice Marshall well appreciated the health risks imposed by denying women access to abortion, including doing so by denying them government subsidies. In *Harris v. McRae*, 448 U.S. 297 (1980), which held that poor women have no constitutional right to Medicaid funding for medically necessary abortion services, Justice Marshall penned a forceful dissent in which he declared the Hyde Amendment "a cruel blow to the most powerless members of our society" and outlined the physical and mental health risks associated with pregnancy.[12]

Kagan's memorandum praised the Third Circuit opinion as "well-intentioned." At the same time, however, she expressed skepticism about whether incarcerated women seeking abortions had "serious medical needs" under the Eighth Amendment, and called the notion that they should receive government assistance to address those needs "ludicrous."

> [T]he [Court of Appeals] held that the denial of elective abortions to inmates constitutes a breach of the duty to attend to inmates' medical needs and therefore contravenes the Eighth Amendment. In this part of the analysis, the [Court of Appeals] strongly suggested that the county must assume the cost of providing inmates with elective abortions in order to comply with the Eighth Amendment. Quite honestly, I think that although all of this decision is well-intentioned, parts of it are ludicrous. Since elective abortions are not medically necessary, I cannot see how denial of such abortions is a breach of the Eighth Amendment obligation to provide prisoners with needed medical care. And given that non-prisoners have no rights to funding for abortions, I do not see why prisoners should have such rights. . . . [The Court of Appeals] simply went too far; this case is likely to become the vehicle that this Court uses to create some very bad law on abortion and/or prisoners' rights.[13]

Kagan's dismissal of the principle enunciated by the lower court — that "serious medical needs" include "non-medically necessary" abortions for incarcerated women — is troubling. The Third Circuit was correct: once a woman decides to terminate her pregnancy, the medical

need for an abortion is immediate. Although abortion is one of the safest and most common medical procedures, it is also time-sensitive; risks from the procedure increase as an abortion is delayed, and too much delay will result in a total inability to procure a legal abortion.

Kagan's skepticism of the Third Circuit's determination that "in the absence of alternative methods of funding, the County must assume the cost of providing its inmates with needed medical care,"[14] overlooked the fact that the lower court's conclusion was based on jurisprudence addressing prisoners' right to medical care, and was not related to the abortion funding cases, as Kagan's memo seemed to suggest. In 1983, the Supreme Court held that if "the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay."[15] In other words, the County could not refuse to care for inmates' serious medical needs on account of the women's indigence. Kagan's brief memo did not address this context, likely because she had already determined that incarcerated women's need for abortion access was not a serious medical need.

Kagan's memo is only several paragraphs long and did not purport to be an in-depth analysis of the issue of access to abortion services for female inmates. The memo did not consider the ways in which incarceration can force the health risks of pregnancy and childbirth on incarcerated women — a consequence of imprisonment that has no analogue for incarcerated men.

For example, the Center for Reproductive Rights represented one woman, Victoria W., in her attempt to hold prison officials accountable for preventing her from securing an abortion while incarcerated. Victoria W. was arrested on a parole violation and sentenced to three months in prison. After medical testing in connection with her parole violation revealed that she was pregnant, Victoria W. immediately requested permission to have an abortion. Despite her willingness (and ability) to pay for the abortion, prison authorities denied her leave to obtain one. While her sentence required her to serve only a few months in prison, those months were precisely the time during which she needed to have the abortion. By the time she was released, she was too far along in her pregnancy to obtain a legal abortion. Victoria W. was forced to carry her high-risk pregnancy to term and undergo an emergency cesarean section.

Pregnancy itself carries significant health risks and complications, which are exacerbated by the health conditions that incarcerated women disproportionately suffer — such as HIV, hepatitis, and diabetes.[16] As recognized by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992), there are psychological costs to carrying an unwanted pregnancy to term: "The mother who carries a child to full term is subject to anxieties, to physical constraints,

to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more [that she continue her pregnancy]."

Kagan's memo did not grapple with these very real physical and psychological needs. This could be a reflection of a lack of knowledge about and experience with the risks of pregnancy generally, and unintended pregnancies in particular; a considered rejection of those risks; or an assessment of the Court's hostility to this issue given its decision in *Harris v. McRae*. Only questioning Kagan on her views will illuminate the underlying reasons for her approach to this case, and how her views have developed over the last two decades.

II. Legal Protections for Women's Health

While serving in the White House, first in the Counsel's office and later on the Domestic Policy Council, Kagan advised President Clinton to support including a too-narrow health exception in federal legislation banning so-called "partial-birth abortion."

Elena Kagan served in the Clinton White House from 1995 to 1999, first in the Counsel's office, where she advised the president on legal matters, and later as Deputy Director of the Domestic Policy Council, which is the primary body tasked with helping the president consider domestic policy issues.[17] Recently released files from the Clinton Library reveal that in those capacities, Kagan was integral in developing the Administration's position on federal legislation banning so-called "partial-birth abortion," which Congress twice passed and President Clinton twice vetoed during Kagan's tenure at the White House.[18]

In 1996, as Associate Counsel to the President, Kagan was one of the key players in the Counsel's office charged with developing the Administration's response to the Partial Birth Abortion Ban Act of 1995 (H.R. 1833). Kagan and her colleagues in the Counsel's office and the Department of Justice recommended that the President oppose the bill because it did not include protections for women's health, and was therefore both unconstitutional and bad policy. They explained that constitutional law provided that:

> Even in the post-viability period, the government's interest in regulating abortion must yield to preservation of a woman's life and health. This means that the government may not deny access to abortion to a woman whose life or health is threatened by pregnancy and that the government may not regulate access to abortion in a manner that effectively requires a woman to bear an increased risk medical risk from the procedure. Because the Act does not allow partial birth

abortions when such procedures will most fully protect a woman's health, it fails to satisfy this standard.[19]

The president's advisors, however, disagreed about the specific contours of the position he should take. They set out several options detailing how the proposed ban could be changed to pass constitutional muster, in order to help him refine his position. The options varied with respect to how the ban would have restricted the availability of the procedure prior to viability, and how protective of women's health the health exception would be.[20]

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court clarified that viability — the point in time at which the fetus can survive outside the womb — is a critical marker for government regulations on abortion. Prior to viability, the government may not put an "undue burden" on abortion access, *i.e.*, "a substantial obstacle in the path of a woman seeking an abortion."[21] After the point of viability, the government may impose increased restrictions on abortion, but must provide an exception to preserve the health and life of the pregnant woman.[22] The Court has explained that a woman's health includes all of the factors relevant to her wellbeing — "physical, emotional, psychological, [and] familial."[23]

The White House Counsel's office took the position that a health exception — though necessary — could be narrowly drawn, so that it was only triggered by "serious" health conditions. They also took the somewhat controversial position that restricting the availability of the procedure prior to viability was not constitutionally problematic, as long as the health exception was expanded to allow use of the specific abortion procedure prior to viability where either the pregnancy posed a threat to a woman's "serious health interests," or where that specific procedure was necessary to "avert a threat to [her] . . . serious health interests."[24]

In contrast, the Office of Legal Counsel (OLC) — the office within the Department of Justice tasked with providing the president with impartial legal analysis — believed that the health interests should not be restricted to include only "serious" ones and that the time period within a pregnancy that would be affected by the proposed law was too broad under then-prevailing constitutional law. In OLC's view, the only way that the ban would be constitutional was for it to apply only in the post-viability time period, and to include a health exception making that type of abortion available "where in the medical judgment of the attending physician, the abortion is necessary to . . . avert an adverse health consequence to the woman."[25]

OLC explained its position in memoranda and Congressional testimony from Walter Dellinger, who was then the Assistant Attorney General. OLC pointed out that the problem with the White House Counsel's position was that in a key case, *Thornburgh v. American College of*

Obstetrics and Gynecologists, 476 U.S. 747 (1986), the Supreme Court invalidated an abortion restriction "requiring that doctors use the abortion procedure most protective of fetal health unless doing so would pose a 'significantly greater medical risk' to the woman. Limiting the health exception to medical risks that qualify as 'significant,' the Court held, would constitute an impermissible 'trade-off' of a woman's health."[26] OLC further explained that pre-viability application of the ban was also constitutionally impermissible because it would constitute an "undue burden."[27]

The available files do not offer any basis for the White House Counsel's stated position — which was at odds with *Thornburgh* and *Casey* — that a health exception could be so narrowly drawn. Nor is there analysis explaining the White House Counsel's view that a pre-viability ban did not pose an undue burden as long as there was a slightly broader health exception.[28] It appears that rather than being grounded in a reasoned constitutional analysis, the assessment was based on what seemed politically feasible given the climate in Congress and what was acceptable as a form of compromise by the president and other political staff. It is also not clear what input Kagan had in the Counsel's ultimate legal conclusion, although the files do suggest that she had at least some involvement.

On April 10, 1996, President Clinton vetoed the ban because it failed to include an exception where necessary to "avert serious adverse health consequences to the woman."[29] The House voted to override the veto, but the Senate fell short by nine votes. Congress again tried to pass the ban in 1997 with a substantially similar bill, H.R. 1122, which still lacked protections for women's health.

Now serving on the President's Domestic Policy Council, Kagan again recommended that President Clinton continue to demand protections for women's health in H.R. 1122.[30] She and her colleagues encouraged the president to endorse an even narrower health exception than the one discussed above, this time in an amendment proposed by Senator Daschle. Kagan wrote that "the Daschle alternative allows Congress to pass a comprehensive, constitutional ban to stop unnecessary abortions of viable fetuses and is a ban that you would sign."[31]

The Daschle Amendment banned all post-viability abortions as opposed to a certain type of abortion procedure, and included an unconstitutionally narrow health exception.[32] Notably, the Daschle health exception would have left women vulnerable to threats on their health. It would have required that a physician certify "that the continuation of the pregnancy would . . . risk grievous injury to [the mother's] physical health." In turn, "grievous injury" was defined by the amendment as "a severely debilitating disease or impairment specifically caused by the pregnancy; or an inability to provide necessary treatment for a life-threatening condition."[33] The

risk of serious injuries to the woman's health from a condition, like diabetes, which is exacerbated by pregnancy but not caused by it, would not have triggered the Daschle health exception. The highly restrictive Daschle Amendment would also have criminalized abortion in cases where it was needed to "provide necessary treatment for a severely debilitating but not life-threatening condition."[34] Such conditions could have included an inability to bear children in the future, or permanent impairment of the woman's vision.[35] Furthermore, even with conditions that are ultimately life-threatening — such as heart failure, renal disease, or cancer — physicians are often only able to determine that a patient's health is deteriorating significantly, and without intervention will at some future point become life-threatening. The Daschle Amendment would not have protected women in those circumstances.

Senator Feinstein also crafted a substitute amendment banning all post-viability abortions, but including a broader health exception. That amendment would have permitted abortion where, "in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman."[36]

Kagan and her colleague Bruce Reed, Director of the Domestic Policy Council, recommended that the president send a letter to Congress indicating that he would accept either the Daschle or Feinstein substitute amendments, despite the fact that OLC continued to take the principled position that both amendments countenanced an unconstitutional "trade-off" of women's health.[37] Kagan and Reed advised the president to endorse the amendments, in particular Daschle's — which they saw as consistent with the president's previous statement that a health exception must be "appropriately confined" — to sustain the president's credibility and prevent Congress from overriding a future veto of the bill. Kagan and Reed believed that it would be difficult for the president to make the case that the Daschle exception afforded insufficient protection for women's health, given that the American College of Obstetricians and Gynecologists had recently endorsed the proposal. They also believed that although the Daschle Amendment was unlikely to garner enough votes to become part of the bill, a strong showing on the amendment would buttress support to sustain the president's veto.[38]

President Clinton communicated his support of the Daschle Amendment to Senator Daschle on May 14, 1997,[39] and the White House took the public position that the language in the Daschle or the Feinstein Amendment would be acceptable and that a bill containing either of those provisions would not be vetoed.[40]

In sum, clearly Kagan recognized the constitutional importance of protecting women's health in the context of any restrictions on abortion, and advocated within the Administration accordingly. However, some of the recommendations with which she concurred would have had

harsh consequences for women seeking abortions, and were unconstitutional under then-prevailing law. It is somewhat difficult to draw a firm conclusion about Kagan's own legal views regarding how robust a health exception must be from documents that reflect political calculations and input from multiple people. The best way to unpack these documents, and the relationship that they bear to Kagan's current views on the necessary protections for women's health, is to explore this issue during her confirmation process.

III. Intersection of Reproductive Rights and Freedom of Speech

In 1992, Kagan wrote a law review article suggesting that the Title X gag rule, upheld by the Supreme Court 5-4 in *Rust v. Sullivan*, should have been struck down as viewpoint discrimination.

A law review article penned by Kagan offers an interesting and thoughtful exposition of her views at the intersection of the First Amendment and reproductive rights. The Title X program, established in 1970, provides public funding for reproductive and other preventive health services, including contraception, treatment of STIs, screening for breast and cervical cancer, pregnancy tests and counseling, and educational programs.[41] In 1988, the Secretary of Health and Human Services promulgated new regulations implementing a "gag rule" which prohibited Title X physicians and counselors from discussing abortion as an option with their patients — even if asked about it directly. Instead, the regulations compelled a Title X provider to refer all pregnant patients to prenatal care or social services providers who "promote the welfare of . . . [the] unborn child."[42]

Title X recipients challenged the regulations in *Rust v. Sullivan*, 500 U.S. 173 (1991). The Supreme Court, by a 5-4 vote, held that the regulations did not violate either freedom of speech or the right to privacy. The Court rejected the petitioners' argument that by prohibiting referrals for and counseling about abortion, while mandating referral to providers who "promote the welfare of . . . [the] unborn child," the regulations discriminated on the basis of viewpoint (*i.e.*, penalizing only particular opinions on a certain subject), and were therefore unconstitutional under the First Amendment. Instead, the Court held that the government can choose which activities to subsidize, and that by enacting the gag rule, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[43]

In a 1992 law review article, Kagan suggested a different way of looking at the First Amendment question in *Rust*.[44] She challenged the notion that the government's decision not to subsidize an activity is constitutionally permissible because it is distinct from imposing a penalty on speech. Kagan reasoned that the Title X regulations "at issue in *Rust* can hardly be

understood except as stemming from government hostility toward some ideas (and their consequences) and government approval of others . . . . [and that] the regulations, in treating differently opposing points of view on a single public debate, benefited some ideas at the direct expense of others and thereby tilted the debate to one side."[45]

In other words, Kagan agreed with the petitioner's argument in *Rust* that the gag rule — which censored one view and commanded another — constituted invidious viewpoint discrimination. Had the Court applied Kagan's framework to *Rust*, the case would have struck down the harmful and discriminatory restrictions as violations of freedom of speech.

IV. Abortion Rights and *Stare Decisis*

In response to questioning during her confirmation process to become Solicitor General, Kagan stated that "the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy," and that as Solicitor General, she would respect *stare decisis* regarding restrictions on abortion.

During her confirmation process for Solicitor General, Kagan was asked about her views on abortion rights several times. In response, she accurately stated current law, expressed deference to *stare decisis* in her role as Solicitor General, and declined to give her opinion on most of the hypotheticals with which she was presented.

In response to the fundamental question of whether the Constitution confers a right to abortion, Kagan answered:

> Under prevailing law, the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy, subject to various permissible forms of state regulation. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.[46]

In response to a question regarding whether she believed the Supreme Court's 2007 *Gonzales v. Carhart* decision was correctly decided, and whether she would defend the federal abortion ban against future legal challenges, Kagan largely demured, stating that settled law deserves "deep respect from the Solicitor General," and that in that role, she would "defend with any reasonable arguments the Partial-Birth Abortion Act against constitutional challenges."[47]

Kagan was also asked whether the position that "there should be Federal funding for abortion" is a "moderate position." She replied that the position that there is a constitutional

right to funding for abortion "has been decisively rejected. The Supreme Court held several decades ago that such funding is not a matter of constitutional right, *see Harris v. McRae*, 448 U.S. 297 (1980), and that holding has not since been seriously challenged."[48] When asked whether she *personally* believed that the Constitution "compels taxpayer funding of abortion," she similarly responded that prevailing law — *Harris v. McRae* — provides otherwise, and as Solicitor General she would "owe respect to this law."[49]

Last, Kagan was questioned about her views on whether informed consent and parental involvement laws violate the Constitution. Kagan again provided a general statement about the state of the law.[50]

With respect to other reproductive rights issues, such as the Bush Administration's midnight regulation allowing health care providers to deny patients vital health care information and services, or reproductive rights articles authored by Professor Dawn Johnsen (who served with Kagan in the Clinton Administration, and who was then under consideration to head the Office of Legal Counsel), Kagan responded that she did not know enough about those issues to address them.[51]

It is difficult to draw many conclusions about how Kagan would approach her role as Supreme Court justice from her written testimony on these topics during her confirmation as Solicitor General. Whereas the Solicitor General is charged with defending federal statues with any reasonable argument, the Supreme Court, in its role in "say[ing] what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), must adjudicate among competing arguments in difficult cases, often without a clear guide in previous law.

Although Supreme Court Justices should also give deference to *stare decisis*, as the highest court in the land, the Justices also inevitably create new precedent, which involves a complex process in which legal analysis is combined with reasoned judgment about a decision's application to a new set of facts. In such a role, Kagan's views and experiences would be a far more essential component of her approach to jurisprudence. For this reason, it is imperative that Senate fully engage its "advice and consent" role and provide opportunities for a full hearing of her views.

Endnotes

[1] *Gonzales v. Carhart*, 550 U.S. 124, 170 (Ginsburg, J., dissenting).

[2] In preparing this memorandum, we reviewed memos Kagan wrote as a law clerk to Justice Marshall (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall); the Clinton presidential records from Kagan's time at the White House (Boxes 001-001 to 001-017, 026-006, 028-015, 067-013, 067-014, 068-003, 069-001 to 069-014, 070-001 to 070-007, and 070-011), *available at* http://www.clintonlibrary.gov/textual.html; Kagan's published law review articles; and the record from Kagan's Solicitor General confirmation process, *available at* http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/SolicitorGeneral-ElenaKagan.cfm. Elena Kagan's White House emails, released on June 18, 2010, were not included in this review.

[3] *Monmouth County Corr. Inst. Inmates*, 834 F.2d at 328.

[4] *Id*.

[5] *Id*. at 328 n.4.

[6] *Id*. at 351–52.

[7] *Id.* at 347, 348.

[8] *Id*. at 349 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

[9] Petition for Writ of Certiorari, Lanzaro v. Monmouth County Corr. Inst. Inmates, 486 U.S. 1006 (1988) (No. 87-1431), 1988 WL 1094541.

[10] *Monmouth County Corr. Inst. Inmates*, 486 U.S. at 1006.

[11] Memorandum from Elena Kagan, Law Clerk, to Thurgood Marshall, Assoc. Justice, U.S. Supreme Court (Apr. 26, 1988) (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Box 430).

[12] *Harris v. McRae*, 448 U.S. 297, 338, 339 (Marhsall, J., dissenting).

[13] Memorandum from Elena Kagan, Law Clerk, to Thurgood Marshall, Assoc. Justice, U.S. Supreme Court 1–2 (Apr. 26, 1988) (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Box 430).

[14] *Monmouth County Corr. Inst. Inmates*, 834 F.2d at 351.

[15] *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 (1983). Although the Court in *Revere* addressed a pre-trial detainee's rights under the Due Process Clause of the Fourteenth Amendment, lower courts have routinely cited the decision in the context of inmates' rights under the Eighth Amendment. *See, e.g.,* Reynolds v. Wagner, 128 F.3d 166, 174 (3d Cir. 1997); Ancata v. Prison Health Services, 769 F.2d 700, 704 (11th Cir. 1985); Benter v. Peck, 825 F.Supp. 1411, 1417, 1418, 1419 (S.D. Iowa 1993).

[16] Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex's Impact on Women's Health*, 18 BERKELEY WOMEN'S L.J. 40, 42 (2003).

[17] Questionnaire for Nominee for the Supreme Court, S. Comm. on the Judiciary, 111th Cong. 2 (2010) (statement of Elena Kagan), *available at* http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm.

[18] A 1998 memorandum released by the William J. Clinton Presidential Library indicates that Kagan agreed with the rest of the Domestic Policy Council, and advisers in the Office of Budget and Management and White House Counsel's office, that the Hyde Amendment — which bans federal funding for abortion except in cases of rape, incest, and a threat to the life of the pregnant woman — should be applied to Medicare funds. Memorandum from Bruce Reed and Charles Ruff to President Clinton (June 12, 1998) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 001, Folder 016, *available at* http://www.clintonlibrary.gov/textual-KaganDPC.htm). At the time, the Department of Health and Human Services took the contrary position that Medicare funds should also cover abortions necessary to protect the health of the woman, because of the uniquely vulnerable status of disabled women (*i.e*., the women of reproductive age who receive Medicare). Later that year, Congress amended the language of the Hyde Amendment to clarify that it applies to Medicare funds. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Title V, §§ 508–509, 112 Stat. 2681, 2681–385 (1998). We do not discuss this issue in greater detail, as Kagan's position was merely referenced in the 1998 memo, and it would not be advisable to draw any larger conclusion about her thoughts on the topic from this source.

[19] Memorandum from Jack Quinn to President Clinton 2 (Jan. 22, 1996) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 069, Folder 008, *available at* http://www.clintonlibrary.gov/textual-KaganDPC-69and70_StaffandOffice.htm) (handwritten note from Jack Quinn

to Elena Kagan congratulating her on a job well done, suggesting that Kagan was one of the initial authors of the memo, or at the least provided input).

[20] Memorandum from Leon Panetta, Jack Quinn, George Stephanopoulos, and Nancy-Ann Min to President Clinton 1 (Feb. 2, 1996) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 069, Folder 008, *available at* http://www.clintonlibrary.gov/textual-KaganDPC-69and70_StaffandOffice.htm).

[21] *Casey*, 505 U.S. at 877.

[22] *Id.* at 879.

[23] *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

[24] Memorandum from Leon Panetta, Jack Quinn, George Stephanopoulos, and Nancy-Ann Min to President Clinton 2 (Feb. 2, 1996) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 069, Folder 008, *available at* http://www.clintonlibrary.gov/textual-KaganDPC-69and70_StaffandOffice.htm).

[25] *Id*.

[26] Memorandum from Walter Dellinger to Jack Quinn (Feb. 1, 1996) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 069, Folder 009, *available at* http://www.clintonlibrary.gov/textual-KaganDPC-69and70_StaffandOffice.htm)

[27] *Testimony Before the S. Comm. on the Judiciary on H.R. 1833*, 104th Cong. 4 (Nov. 16, 1995) (statement of Walter Dellinger, Assistant Att'y Gen. of the United States) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 069, Folder 014, *available at* http://www.clintonlibrary.gov/textual-KaganDPC-69and70_StaffandOffice.htm) (citing *Casey*, 505 U.S. at 874–77).

[28] In a February 15, 1996, memorandum, Kagan wrote that too narrow a health exception pre-viability — limiting the exception to cases where the abortion itself (as opposed to the choice of procedure) was necessary to avert serious health threats — would be unconstitutional. Memorandum from Elena Kagan to Jack Quinn 1 (Feb. 15, 1996) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 069, Folder 008, *available at* http://www.clintonlibrary.gov/textual-KaganDPC-69and70_StaffandOffice.htm) ("[I]t [would be] unconstitutional, because it prohibits use of the partial birth procedure in <u>any</u> pre-viability case in which the woman desires the abortion for non-health related reasons, even if the partial birth procedure (as compared to other procedures) is necessary to protect her from serious adverse health consequences.").

[29] Partial Birth Abortion Ban Act—Veto Message from the President of the United States (H. Doc. No. 104–198), *reprinted in* 142 CONG. REC. H3338–39 (daily ed. Apr. 15, 1996).

[30] Memorandum from Elena Kagan, John Hilley, and Tracey Thornton to President Clinton 2 (Apr. 10, 1997) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 001, Folder 005, *available at* http://www.clintonlibrary.gov/textual-KaganDPC.htm).

[31] *Id.* at 6.

[32] 143 CONG. REC. S4614–15 (daily ed. May 15, 1997) (statement of Sen. Daschle).

[33] *Id.* at S4615 (statement of Sen. Daschle).

[34] *Id.* at S4570 (letter from Prof. Laurence Tribe to Sen. Feinstein).

[35] *See id*.

[36] *Id.* at S4614 (statement of Sen. Feinstein).

[37] Memorandum from Bruce Reed and Elena Kagan to President Clinton 1, 2 (May 13, 1997) (on file with the William J. Clinton Presidential Library, Clinton Presidential Records, Elena Kagan, Box 001, Folder 005, *available at* http://www.clintonlibrary.gov/textual-KaganDPC.htm).

[38] *Id.*

[39] Press Briefing, White House Press Secretary Mike McCurry (May 14, 1997), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=48475.

[40] *Id.* Senators Daschle and Feinstein each proposed their amendments on May 15, 1997. The Daschle amendment was defeated 36-64; the Feinstein amendment was defeated 28-72. The Senate passed H.R. 1122 without a health exception by a vote of 64-36 on May 20, 1997. The president vetoed the bill on October 10, 1997, again citing the lack of a health exception. Partial Birth Abortion Ban Act—Veto Message from the President of the United States

(H. Doc. No. 105–158), *reprinted in* 143 CONG. REC. H8891–92 (daily ed. Oct. 21, 1997). The House voted to override the president's veto; the Senate narrowly failed to override by a vote of 64-36.
[41] Office of Population Affairs, U.S. Dep't of Health & Human Services, Family Planning, http://www.hhs.gov/opa/familyplanning/index.html (last visited June 10, 2010).
[42] 42 C.F.R. § 59.8(a)(2) (1988).
[43] *Rust*, 500 U.S. at 193.
[44] *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REVIEW 29.
[45] *Id*. at 67.
[46] *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 152 (2009) (statement of Elena Kagan), *available at* http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/SolicitorGeneral-ElenaKagan.cfm.
[47] *Id*. at 152.
[48] *Id*. at 169–70.
[49] *Id*. at 152.
[50] *Id*. at 152–53.
[51] *Id.* at 147, 173.