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## MEMORANDUM

**TO:** Tribal Leaders and Tribal Attorneys  
National Congress of American Indians – Project on the Judiciary

**FROM:** Richard Guest, Staff Attorney, Native American Rights Fund

**RE:** The Nomination of Elena Kagan to the Supreme Court of the United States –  
An Indian Law Perspective

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On May 10, 2010, President Obama announced the nomination of Solicitor General Elena Kagan to replace Justice John Paul Stevens who announced his retirement from the Court at the end of its current term. On June 28, 2010, the United States Senate Judiciary Committee will convene hearings to consider her confirmation as an Associate Justice to the Supreme Court of the United States. President Obama has expressed a desire to confirm Solicitor General Kagan before the August recess, well before the start of the Court's October 2010 Term.

### A Brief Biography

Elena Kagan was born in New York City in April 1960, the only daughter of Robert Kagan and Gloria Kittelman Kagan. Her mother was an elementary school teacher in Harlem, who then moved to Hunter College Elementary, a publically funded school for intellectually and academically gifted students. Her father was a lawyer, a graduate of Yale Law School, who initially worked to secure federal protections for Native Americans and then focused on representing apartment tenants during co-op conversions. The Kagan family lived in Stuyvesant Town, a post-World War II housing project on the East Side before moving to Manhattan's West Side. Kagan's early years were no doubt shaped, in part, by her parent's political passions, what one relative described as "people who had a very keen sense of social justice."<sup>1</sup>

Elena Kagan attended Hunter College High School, an intellectually rigorous all-girls private school on the Upper West Side of Manhattan. She displayed her judicial ambitions early, pictured in the high school yearbook wearing robes and carrying a gavel during graduation. After graduation, she attended Princeton University, where she worked on the student newspaper and graduated *summa cum laude* with a bachelor's degree in history in 1981. A scholarship enabled

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<sup>1</sup> Amy Goldstein, *The Battle to Define Kagan*, WASHINGTON POST, May 11, 2010. No further information has been discovered regarding the nature and scope of Robert Kagan's work for Native Americans early in his career.

her to study at Worcester College at Oxford University in England where she received a Master of Philosophy in 1983. She then completed her Juris Doctor, *magna cum laude*, at Harvard Law School in 1986, where she was supervising editor of the Harvard Law Review. After law school, she clerked for Judge Abner Mikva, an outspoken liberal on the U.S. Court of Appeals for the D.C. Circuit. She then went on to clerk for Justice Thurgood Marshall—the civil rights legend—on the Supreme Court of the United States.

After two years of private practice as an associate attorney at Williams & Connolly in Washington, D.C., Kagan accepted a position 1991 as an associate professor at the University of Chicago Law School, where she focused on constitutional law, particularly First Amendment free-speech jurisprudence. In 1995, Kagan accepted a position as associate counsel in the Office of the White House Counsel where she addressed a number of legal issues affecting President Clinton, including decisions to sign or veto legislation. In 1997, Kagan became the deputy assistant to the President for domestic policy and the deputy director of the Domestic Policy Council, which advises the President on domestic policy and helps create legislation to effect policy goals. As discussed below, during her time in the Clinton White House, Kagan was exposed to issues affecting Native Americans, including tribal gaming, tobacco regulation, Indian education and crime in Indian country. In 1999, President Clinton nominated Kagan to become a judge on the U.S. Circuit Court of Appeals for the D.C. Circuit. However, the Senate Judiciary Committee, chaired by Senator Orrin Hatch, never scheduled a hearing on her nomination.

In 1999, Kagan returned to academia as a visiting professor at Harvard Law School, becoming a full professor two years later. At Harvard, she taught courses in Administrative Law, Civil Procedure, Constitutional Law, and Presidential Law and Lawmaking. In 2003, she became the first female dean of Harvard Law School. That same year, the Oneida Nation of New York endowed the Oneida Nation Chair—a Professorship of Indian Law—helping to create one of the stronger Indian law programs in the Northeast. On January 5, 2009, President-elect Barack Obama nominated Kagan to serve as Solicitor General of the United States, the federal official responsible for litigation involving the United States before the Supreme Court and the U.S. Circuit Courts of Appeal. The Senate confirmed Kagan by a 61-31 vote; she became the first woman to hold the post of Solicitor General.

### **Kagan's Federal Indian Law Experience**

An extensive review of Kagan's academic and administrative record reveals that she has had limited exposure to, but no direct experience with federal Indian law. Unlike her recent predecessors in the confirmation process—Chief Justice Roberts, Justice Alito and Justice Sotomayor—Kagan has never served as a judge and therefore has no judicial record on Indian law cases. During her tenure as a clerk for Justice Marshall, two important Indian law cases involving religious freedom were considered by the Supreme Court: *Employment Division v. Smith* and *Lyng v. Northwest Indian Cemetery Protective Ass'n*.<sup>2</sup> Ultimately, in both cases, tribal

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<sup>2</sup> *Employment Division v. Smith*, 485 U.S. 660 (1988) (remanded to the Oregon Supreme Court on the question of whether peyote use for religious purposes is prohibited under Oregon law), and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (although Forest Service decision to pave road and allow timber harvesting in

interests lost. Justice Marshall did not write an opinion in either case, but he did sign onto Justice Brennan's dissent in both cases. A thorough search through the Marshall Papers at the Library of Congress did not turn up any memos, writings, or notes authored by Kagan in relation to these two cases.<sup>3</sup>

As Solicitor General of the United States, Kagan has no doubt participated in discussions regarding petitions for writ of certiorari involving questions of Indian law, including cases where the interests of the United States are adverse to tribal interests.<sup>4</sup> No Indian law cases were argued on the merits during her tenure as Solicitor General. The Court, however, did grant review in one case involving tribal interests to be argued next term: *United States v. Tohono O'odham Nation*.<sup>5</sup> Although *Tohono O'odham* originated as a claim for money damages stemming from federal mismanagement of trust assets, the government sought certiorari on a narrower question of statutory interpretation: namely, whether federal law barred the tribe's claim in the Court of Federal Claims where the tribe had filed a similar claim for equitable relief in federal district court. However, as the government's brief notes, the determination of this question in the government's favor could have an adverse impact on tribes' ability to seek full relief in trust mismanagement cases, since it has arisen in "more than 30 pairs of Indian tribal trust cases currently pending in the CFC and district court."<sup>6</sup> It is difficult to impute the views of the United States in this litigation to Kagan, but she is certainly aware of the case and its implications given her summary description of the case in a May 2010 speech to the Court of Federal Claims.<sup>7</sup>

While dean of Harvard Law School, Kagan spoke at a number of gatherings related to Native issues. In 2004, when the editors of the revised version of Cohen's *Federal Indian Handbook* gathered at Harvard, Kagan stated, "Federal Indian law is an important and rapidly expanding field, and I believe Harvard has an obligation to support research and teaching in this area."<sup>8</sup> In 2006, the Navajo Supreme Court held oral arguments at Harvard. In her opening

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area of religious significance to Native Americans would have serious adverse impacts on ability of Indians to practice their religion, effects are incidental and not in violation of the First Amendment's Free Exercise Clause).

<sup>3</sup> During Kagan's clerkship with Judge Mikva on the DC Circuit only two Indian law cases were decided: *New Mexico Energy and Minerals Dept., Mining and Minerals Div. v. U.S. Dept. of the Interior*, 820 F.2d 441 (1987) (state regulatory jurisdiction over "Indian lands" under Surface Mining Act); and *James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132 (1987) (intra-tribal dispute between factions of a non-federally recognized tribe regarding federal grant funding). Judge Mikva did not author either of these opinions, however he wrote a very brief concurrence in the *New Mexico* case.

<sup>4</sup> The United States did not petition for review in any cases involving tribal interests, except for *Tohono O'odham Nation v. United States* (No. 09-846) in which review has been granted (discussed in text). The United States did file briefs in opposition as respondents in several cases involving Indians and Indian tribes which have been denied review, including *Barrett v. U.S.* (No. 09-32); *Bennally v. U.S.* (No. 09-5429); *North County Community Alliance v. Salazar* (No. 09-800); *Wolfchild v. U.S.* (No. 09-579); and *Sharp v. U.S.* (No. 09-820).

<sup>5</sup> *Tohono O'odham Nation v. United States*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3687 (U.S. Apr. 19, 2010) (No. 09-846).

<sup>6</sup> Reply Brief for the Petitioner, *United States v. Tohono O'odham Nation*, -- S.Ct. -- (2010) (No. 09-846), 2010 WL 1321424.

<sup>7</sup> Elena Kagan, Solicitor General, Remarks at U.S. Court of Federal Claims Law Day Luncheon (May 7, 2010), available at <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12D/upload/12D-1-050710.pdf>.

<sup>8</sup> *Editors of Indian Law Handbook Convene*, HARV. L. TODAY, Dec. 1, 2004, at 2.

remarks welcoming the tribal justices, Kagan stressed the importance of “understand[ing] tribal legal systems because increasing numbers of us will find our practice intersecting with these systems” and praised the Navajo peacemaking court system as a model in “an age of global conflict.”<sup>9</sup> She also spoke at the Native American Alumni Celebration in 2007 and the Harvard University Native American Program Event in 2008, but there is no record of her comments. In 2008, Kagan accepted an appointment to the advisory board of the American Indian Empowerment Fund, a non-profit organization linked to the Oneida Nation that focuses on improving the lives of Native Americans. Kagan noted that the Fund was dealing with difficult issues and that “I hope I can contribute, in some small way, to making progress on them.”<sup>10</sup>

Although incomplete, the recent release of the Clinton Library documents reveals Kagan’s involvement within the Clinton Administration, first as associate counsel within the Office of the White House Counsel, then as deputy director for the Domestic Policy Council, in decisions relating to a number of regulatory matters, policy initiatives and legislative proposals affecting Indian country.

#### 1. Office of White House Counsel (1994-1996)

The bulk of Kagan’s involvement with Indian law during her tenure as associate counsel came in the area of gaming.<sup>11</sup> Most of these cases did not directly involve the Office of the White House Counsel, but Kagan appeared to stay abreast of developments in key Indian gaming cases, particularly *Seminole Nation*.

##### a. Massachusetts and the Wampanoag Tribe

After the passage of the Indian Gaming Regulatory Act (IGRA), the Wampanoag Tribe entered into negotiations with the State of Massachusetts for the creation of a casino in the Boston area. A draft compact was reached which promised payments from the casino in return for exclusivity in the greater Boston area, excepting slot machines at racing tracks. However, the project encountered two difficulties at the federal level. First, the plan anticipated condemning land for the casino, a procedure the Bureau of Indian Affairs (BIA) opposed. Second, the BIA argued that approval of the revenue-sharing provision would violate its trust relationship with the tribes since it would allow *de facto* state taxation and suggested a *quid pro quo* in return for state approval. The BIA had approved a similar agreement between the Mashantucket Pequot Tribe and the State of Connecticut, which provided statewide exclusivity in return for revenue-sharing.

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<sup>9</sup> Elena Kagan, Preliminary Remarks at Navajo Nation Supreme Court Gathering at Harvard Law School (Apr. 12, 2006), available at [http://judiciary.senate.gov/nominations/SupremeCourt/KaganVideo/disc2-2006\\_04\\_12\\_singer\\_navajosuprcourtssess.ram](http://judiciary.senate.gov/nominations/SupremeCourt/KaganVideo/disc2-2006_04_12_singer_navajosuprcourtssess.ram).

<sup>10</sup> June Q. Wu, *HLS Dean Joins Indian Fund Board*, HARV. CRIMSON, Apr. 24, 2008.

<sup>11</sup> Although Kagan was involved in other cases, her involvement was minimal. These cases included *Klamath Tribes v. United States* (U.S. Forest Service sales of timber violated tribal hunting rights secured by treaty); and *Navajo-Hopi* (legislative solution to the ongoing border dispute between the Hopi and Navajo tribes).

However, the BIA claimed that only statewide exclusivity was satisfactory, and in late 1995, the Assistant Secretary of the Interior for Indian Affairs disapproved the compact.

These complicated considerations led to conflict between Congressman Barney Frank and the Wampanoag Tribe on the one hand who were anxious to secure approval for the compact and the BIA on the other, with frequent tense letters dispatched between the offices. The compact ultimately failed when it failed to pass the state legislature. Kagan became involved in early 1996, after the Department of the Interior had already disapproved the compact. While many of her notes and memoranda to White House Counsel Jack Quinn have been redacted, the materials that survive suggest she had extensive conversations with officials at the Department over the issue. She also wrote in a very brief memo to Jack Quinn, “[T]he more I think about Interior’s position [disapproving the compact], the more legally vulnerable it seems to me.”

b. Wisconsin and the McCain Inquiry

In 1995, the Department of Interior (DOI) denied an application by three Wisconsin Indian tribes to take land in trust for the development of a casino. A year later, *The Wall Street Journal* published an article that suggested other Minnesota and Wisconsin tribes had used political influence as Democratic donors to secure White House support to kill the project. Senator John McCain sent letters to President Clinton and his staff asking for additional information regarding these allegations. Secretary Bruce Babbitt, Harold Ickes, and the White House Counsel all responded with letters denying the charges and offering strong evidence that other factors led the DOI to deny the application. Kagan helped draft the White House response to McCain’s inquiry strongly denying the accusations of improper influence, and facilitated communications between the White House Counsel’s Office and the DOI.

c. New Mexico and the 1995 Gaming Compacts

In 1995, after fourteen Indian tribes had entered gaming compacts with the State of New Mexico, the state supreme court issued two decisions that challenged the status of the tribal-state compacts. In *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), the court determined that the governor had exceeded his authority by approving the gaming compacts. In *Citation Bingo v. Otten*, 910 P.2d 281 (N.M. 1995), the court decided that casino gambling was not legal in New Mexico, a ruling that posed difficulties given the IGRA-based framework that allowed Indian casino gaming only if similar gaming was legal in the state. The U.S. Department of Justice reviewed the rulings and their impact on the tribal-state compacts. Kagan was involved in these discussions. She received updates on the situation from Herbert Becker, director of the Office of Tribal Justice. The controversy was ultimately resolved through state legislation.

d. Florida and the Seminole Tribe

Perhaps the most important gaming case decided during Kagan’s tenure at the White House Counsel’s Office was *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which invalidated much of the enforcement mechanism of IGRA. Prior to the Supreme Court’s decision, IGRA had provided that when states failed to negotiate a Class III gaming compact

with a tribe in good faith, the tribe could file suit against the state in federal court. Overturning precedent, the Court held that Congress did not have the power to abrogate state sovereign immunity under the Indian Commerce Clause, and therefore states could not sue unless the state waived immunity. Kagan had little role in the case itself even though copies of all the briefs in the case are within Kagan's folders (without any handwritten comments). However, Kagan appears to have been primarily responsible for coordinating the Administration's response to the ruling. Kagan wrote a lengthy memo to Harold Ickes and Jack Quinn detailing the ruling's impact. Kagan also attended meetings to determine what measures should be taken to repair IGRA's regulatory enforcement mechanism. Her handwritten notes stress the need for some type of remedy. She recorded the exploration of a number of potential options, focusing mostly on the potential use of Interior's rulemaking power to circumvent state sovereign immunity.

## 2. Domestic Policy Council (1997-1999)

### a. Tribal Sovereignty

The Clinton Administration placed considerable emphasis on respect for tribal sovereignty. President Clinton issued an Executive Memorandum in 1994 that directed all departments and agencies to work with tribes within a government-to-government framework. In 1997, the White House Chief of Staff requested reports on the Memorandum's implementation. Agencies were urged to adopt a policy on government-to-government relations and describe their efforts to support tribal self-government, coordinate with other executive departments, and improve working relations with tribes. Kagan played a role in helping produce the report on agencies' development of the government-to-government relationship.

As significantly, the Administration assiduously fought congressional efforts to limit tribal sovereignty. The Administration strongly opposed and threatened to veto a legislative rider that would have federally taxed tribal income, including gaming, even though similar state income was tax exempt. It also successfully blocked a provision that would have required tribes receiving Tribal Priority Allocations to waive sovereign immunity, and contemplated a veto of legislation that would have impinged on the subsistence hunting rights of Alaskan Natives.

One particularly important defense of tribal sovereignty came in the context of the tobacco settlement. In 1998, the states entered into settlement negotiations of claims against the tobacco companies. Senator McCain simultaneously proposed a bill to comprehensively reform the tobacco industry and curb youth smoking. Over McCain's objections, the Gorton Amendment was added to the bill to require tribes to remit state taxes collected on non-Indian tobacco sales to the federal government, which would then transfer these funds to these states. The Clinton Administration strongly opposed this amendment, which it regarded as an infringement upon tribal rights of self-determination and an interference on cooperative agreements. The Amendment was eventually defeated. Kagan was instrumental in organizing the tobacco settlement, although at one point in discussions regarding the Gorton amendment, she seemed to adopt a position that could be construed as adverse to tribal interests. In a notation on an email that there was no debate over the Department of Justice's position opposing the Gorton Amendment as an interference with tribal sovereignty, Kagan wrote, "Seems wrong to

me.” It is not clear whether she was referring to the Gorton Amendment or to the position of the Department of Justice.

b. Indian Education

President Clinton’s 1994 White House meeting with tribal leaders led to an ongoing dialogue over Indian education. In 1997, tribal leaders and educators drafted a proposal for an executive order outlining a comprehensive federal Indian education policy. In 1998, President Clinton signed an executive order, which created an interagency task force charged with proposing reforms to Indian education. The Interagency Plan contained two centerpiece initiatives. First, it proposed an American Indian Corps of Teachers to create 1,000 new American Indian teachers. Second, it proposed increasing funding to replace aging BIA schools and infrastructure. Both of these proposals were funded in the FY 2000 budget. Kagan was involved in the initial stages of planning regarding Indian education. She noted on an email sent to her on this issue that at least one of the fifty sites selected for the Administration’s Educational Opportunity Zone initiative should be an Indian reservation. There is little evidence, though, of her involvement in the drafting of the executive order or the interagency plan.

c. Crime in Indian Country

In 1997, the Clinton Administration explored potential solutions to a dramatic upswing in crime in Indian country. President Clinton directed the Secretary of the Interior and the Attorney General to draft proposed remedies to the crisis. An “Executive Committee for Indian Country Law Enforcement” was formed, chaired by representatives from the Department of Justice and the Bureau of Indian Affairs, and with a variety of tribal leaders, US attorneys, and representatives of law enforcement agencies participating. After consulting with tribes about their law enforcement needs, the Committee issued its final report in October 1997. The report found that law enforcement in Indian country was severely lacking, primarily due to scarce funding, and proposed a \$585 million project to provide better resources to Indian tribes. The Office of Management and Budget resisted fully funding the initiative, providing only \$205 million, most of which came from redirected grant sources. In FY 2000, only \$164 million was directed toward the Departments of Justice and Interior to fund the initiative. Kagan was closely involved in the determination of policy on this issue: her handwritten notes indicate she was present at the initial meetings, and she was copied on most of the emails and faxes. David W. Ogden, Counselor to the Attorney General, thanked Kagan for “all the help you have provided on this issue.” However, little by way of her own views were recorded, except a brief note expressing concern over the high cost of the Executive Committee’s report.

d. Economic Development in Indian Country

In 1998, President Clinton was the keynote speaker at the Native American Economic Development Conference. In his remarks, he announced plans for the federal government to work to improve technology infrastructure in Indian country, develop a strategic plan to coordinate economic development, and create streamlined access to mortgage lending on the reservation. He also announced the disbursement of \$70 million to assist the creation of

technology start-ups among seven tribes. The following year, the Administration secured funding for the creation of a toll-free number at the BIA for tribes to access information on how the federal government could assist with development efforts. Kagan's role in these policy initiatives is unclear. Although she received copies of the relevant memoranda, she does not seem to have been involved in crafting any of these policies.

### **Should Indian Country support or oppose Kagan's nomination?**

As a replacement for Justice Stevens who has been on the Court for nearly 35 years,<sup>12</sup> Elena Kagan offers another fresh opportunity for Indian country to re-energize its efforts to slow and eventually reverse the erosion of tribal sovereignty by the Court. As we noted last year during the confirmation of Justice Sotomayor, there is very little possibility that Kagan's vote on the Court, by itself, will change the outcome in future Indian law cases. Nonetheless, Indian country needs a champion on the Court – a Justice (or two) who will look beyond just the last 30-years of Indian law. As Dean David Getches noted in his 2001 article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice, and Mainstream Values*, Indian country needs an intellectual leader among the Justices to emerge – one who “can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field.”<sup>13</sup> Indian country needs a strong voice and a determined spirit to counter Justice Scalia's subjective view of Indian law:

[O]pinions in this field have not posited an original state of affairs that can be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be taking into account all legislation, and the congressional ‘expectations’ that it reflects, down to the present day.<sup>14</sup>

Most observers already see a clear-path for Elena Kagan's confirmation. Indian country should carefully consider expressing their support for her confirmation, perhaps exploring early opportunities for her to accept a role as their intellectual leader. Once confirmed, Indian country can extend her an invitation to visit tribal courts, meet with tribal leaders and judges, and to observe first-hand the challenges confronting tribal governments.

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<sup>12</sup> For a summary of Justice Steven's record on Indian law cases, see Matthew Fletcher, The Indian Law Legacy of Justice Stevens (Apr. 10, 2010), available at <http://turtletalk.wordpress.com/2010/04/09/the-indian-law-legacy-of-justice-stevens/>.

<sup>13</sup> 84 Cal. L. Rev. 1573 (2001)

<sup>14</sup> Memorandum from Justice Antonin Scalia to Justice William Brennan, Jr. (Apr. 4, 1990)(Duro v. Reina, No. 88-6546), in Papers of Justice Thurgood Marshall, Collections in the Manuscript Division, Library of Congress.