



June 28, 2010

Senator Patrick Leahy, Chairman
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510

Senator Jeff Sessions, Ranking Member
Senate Committee on the Judiciary
326 Russell Senate Office Building
Washington, DC 20510

1718 Connecticut Ave NW
Suite 200
Washington DC 20009
USA
+1 202 483 1140 [tel]
+1 202 483 1248 [fax]
www.epic.org

Dear Chairman Leahy, Senator Sessions, and Members of the Judiciary Committee,

We write to you regarding the nomination of Solicitor General Elena Kagan. She is an excellent candidate for the Supreme Court. Nonetheless, we urge you to explore her views on the right to privacy, particularly as they may relate to the future of the Fourth Amendment and new technologies. The Court's increasing focus on these issues means that her views on this topic will have far-reaching implications.¹

The Electronic Privacy Information Center (EPIC) is a public interest research organization in Washington, DC that focuses on emerging privacy and civil liberties issues. EPIC routinely files amicus briefs in the Supreme Court and other federal courts.² We have a particular interest in the nominee's views on this subject.

The nominee's record as a Solicitor General and as a legal scholar is well known.³ However, her views on privacy-related issues are not well known. Considering that the Court increasingly confronts these questions, we believe it is important to understand how the nominee views the relationship between the Constitution and emerging

¹ See, e.g., *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ____ (2010).

² See, e.g., *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ____ (2010); *Doe v. Reed*, No. 09-559, 561 U.S. ____ (2010); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable and Telecommunications Association v. Federal Communications Commission*, 555 F.3d 996 (D.C. Cir. 2009); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincaid*, 379 F.3d 813 (9th Cir. 2004), cert. denied 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

³ Barack Obama, *Remarks by the President and Solicitor General Elena Kagan at the Nomination of Solicitor General Elena Kagan to the Supreme Court*, The White House, Office of the Press Secretary, May 10, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>

challenges to privacy.

As Chairman Leahy stated recently, “[a] hallmark of real-world judging is acknowledging the challenges of construing the Constitution’s broad language given our social and technological developments.”⁴ The nominee herself has written that the nomination process should “evok[e] a nominee’s comments on particular issues—involving *privacy rights*, free speech, race and gender discrimination, and so forth—that the Court regularly faces.”⁵ In so stating, Kagan has acknowledged the importance of exploring the nominee’s views on privacy and related issues.

EPIC has reviewed the nominee’s past statements, articles, and decisions as Solicitor General concerning privacy and related issues.⁶ There are a several items in her history as a White House counsel and as Solicitor General that should be examined further.

Body Scanners and the Scope of the Right to Privacy

The nominee worked as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council (DPC) for the Clinton administration. During her time with DPC, she produced a memorandum raising significant privacy issues, especially in light of contemporary debate over full body scanners in airports.⁷

The nominee voiced⁸ support for “hand held gun detector devices” that would enable “police...[to] potentially scan people in public places without their knowledge.”⁹

⁴ Senator Patrick J. Leahy, *Statement On The Nomination Of Elena Kagan To The Supreme Court*, June 21, 2010, http://leahy.senate.gov/press/press_releases/release/?id=04760171-e96b-4b9f-a19f-7e923b90fd35.

⁵ Elena Kagan, *Confirmation Messes, Old and New*, 1995 U CHI. L. REV. 919, 936 (emphasis added).

⁶ EPIC, *Elena Kagan and Privacy*, <http://epic.org/privacy/kagan/> (last visited June 28, 2010). See also EPIC, *Sotomayor and Privacy*, <http://epic.org/privacy/sotomayor/> (last visited June 28, 2010); EPIC, *1972 Alito Princeton Privacy Report*, available at <http://epic.org/privacy/justices/alito/princeton/>; Letter from EPIC to Chairman Arlen Specter and Ranking Member Patrick Leahy Regarding the Nomination of Judge John G. Roberts, Sept. 9, 2005, <http://epic.org/privacy/justices/roberts/0905letter.pdf>.

⁷ See EPIC, *Whole Body Imaging Technology*, <http://epic.org/privacy/airtravel/backscatter/> (last visited June 4, 2010); *TSA: Whole Body Imaging*, http://www.tsa.gov/approach/tech/body_imaging.shtml (last visited Apr. 10, 2009, no longer available); The Privacy Coalition, *Stop Whole Body Imaging* <http://www.stopdigitalstripsearches.org/> (last visited June 7, 2010).

⁸ The document in question is a titled, dated, but unsigned memo. It is located in a series of Kagan’s boxes from her time with the Domestic Policy Council labeled “Ideas – Generally.” Most of the boxes released that are not labeled “Ideas” contain memos sent to Kagan; however, the “Ideas” boxes appear to her own thoughts, proposals, notes, etc. on issues related to the Clinton administration. Therefore, though Kagan’s signature does not appear on this document, given the placement of the document within the released record, it is more likely than not that Kagan was the author, or at least co-author, of this memo.

⁹ Memorandum, in Clinton Presidential Records Box 31, Folder 8, 61, available at http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%203138/178_DOMESTIC%20POLICY%20COUNCIL%20BOX%2031-38.pdf.

Kagan proposed federal guidelines that would “allow officers to scan liberally, particularly in airports, train stations and traffic stops.”¹⁰ Kagan assessed both the pros and cons of this proposal—“Pro: We should use every tool to discourage those with guns. Con: This is overkill and carrying concealed weapons is legal in many places.”¹¹ However, she failed to mention the privacy issues involved in such intrusive scanning of citizens by government officials.

More than ten years have passed since the nominee wrote that memo and now Americans are routinely subjected to intrusive searches, which many find objectionable and are likely to be challenged in court.¹² Post-September 11, 2001, airport security has undergone significant changes. Most recently, the Transportation Security Administration (TSA) has introduced the use of “Full Body Scanners” to take naked pictures of air travelers at airports. Security experts have likened these scans to “digital strip searches” for all air travelers and have voiced concern over retaining images of travelers. EPIC and other privacy and civil liberties groups have expressed strong opposition to the use of such scanners. Several Senators have also expressed concern.¹³ In light of Kagan’s statements in favor of hand held body scanners, her views on privacy protections in search techniques should be examined.

The TSA body scanners, like hand held gun detection devices, subject citizens to searches by government officials. The TSA has justified the use of full body scanning in airports in the interest of national security. Similarly, Kagan justified the widespread and liberal use of gun scanners to combat gun violence. Both domestic gun violence and threats of terrorism concern the safety of citizens, and both hand held scanners and “Full Body Scanners” are tools used to “discourage those with guns.”

Determining the application of Constitutional safeguards to new techniques that are designed to detect weapons is not a simple problem. The Supreme Court has indicated that searches at airports that uncover only contraband are not even “searches” for the purposes of the Fourth Amendment.¹⁴ But other Justices have suggested that these techniques can be imperfect and that a significant Fourth Amendment interest remains.¹⁵

It is important to ask the nominee whether she considers the use of a body scanner by the TSA to be a “search” under the Fourth Amendment. More generally, it would be worth exploring what factors she believes the Court might consider in reaching a determination on this issue.

¹⁰ *Id.*

¹¹ *Id.*

¹² Joe Sharkey, *In Body Scans, Less Attitude Please*, N.Y. Times, June 21, 2010, available at <http://www.nytimes.com/2010/06/22/business/22road.html>.

¹³ Senate Committee on Homeland Security, *Senators Urge Secretary Napolitano to Review Airport Screening Technology Now Being Employed in Amsterdam*, Apr. 13, 2010 (from Senators Collins, Kyl, and Chambliss), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=f8689e7-5056-8059-767f-091debe8eae4

¹⁴ *U.S. v. Place*, 462 U.S. 696 (1983).

¹⁵ *See Illinois v. Caballes*, 543 U.S. 405, 410-12 (2005) (Souter, J., dissenting).

Use of Criminal Records for Background Checks

Also during her time in the White House, Kagan expressed support for background checks legislation that privileges societal safety over individual privacy and may fall outside of Fourth Amendment protections against unreasonable search as well as Privacy Act safeguards. In a March 12, 1997, memorandum co-written with Bruce Reed, she suggested introducing “legislation prepared by the Justice Department that would facilitate criminal checks for non-criminal purposes—for example, a check on a potential nanny or schoolbus driver.”¹⁶ In a February 27, 1997, memorandum, Kagan and Reed suggested review of a “legislative proposal . . . [that] would require criminal background checks for home health providers participating in Medicare.”¹⁷

Kagan received a legislative referral memorandum on June 22, 1998, from Andrew Cuomo regarding the revised Housing and Urban Development (HUD) report on S462, HR 2 Public Housing Reform and Responsibility Act of 1997. Kagan was asked, along with a dozen or so other White House officials, to advise on the provided comments. One suggestion in the memorandum was that “[t]he Administration oppose[] the apparent requirement in the House bill that private owners of federally assisted housing be provided with information regarding criminal conviction records of adult applicants or tenants of that housing.”¹⁸ Cuomo continues, writing that “[t]he Administration opposes allowing any private citizen or entities . . . to obtain criminal record information about other individuals. The provision of such sensitive information to private individuals and entities raises significant privacy concerns.”

It is not possible to determine the nominee’s reactions to this particular memorandum; however, there is evidence, in memoranda co-written with Bruce Reed¹⁹ as well as the introduction by the President of the National Crime Prevention and Privacy Compact, below, suggesting the nominee’s support of privacy protections in criminal background checks was not as strong as that held by others in the Clinton administration at the time.

A January 27, 1998 memorandum preparing for the 1998 State of the Union Address includes comments on the National Crime Prevention and Privacy Compact. The Compact would “facilitate effective background checks on child care providers by eliminating state law barriers to sharing criminal history information for non-criminal

¹⁶ Memorandum, in Clinton Presidential Records Box 31, Folder 8, 68, *available at* http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%203138/178_DOMESTIC%20POLICY%20CONCIL%20BOX%2031-38.pdf.

¹⁷ *Id.* at 78.

¹⁸ Memorandum, Forsgren Andrew Cuomo to Kagan et al, Memorandum, June 22, 2010, in Clinton Presidential Records, ARMS/TRP Email – Composed, Boxes 11-16, 21021595, *available at* <http://www.clintonlibrary.gov/textual-Kagan-COMPOSED-EMAIL.htm>.

¹⁹ Memorandum, in Clinton Presidential Records Box 31, Folder 8, 68, *available at* http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%203138/178_DOMESTIC%20POLICY%20CONCIL%20BOX%2031-38.pdf

purposes.”²⁰ This legislation follows memoranda Kagan co-wrote with Bruce Reed in February and March 1997²¹ proposing criminal background checks for non-criminal purposes, such as for employment of nannies and schoolbus drivers. It is unclear whether Kagan weighed individuals’ privacy concerns against the state interest of preventing a “tragedy in child care.”²²

Kagan’s support for the use of background checks, in light of the concerns of other Clinton Administration officials, has implications regarding involuntary disclosure of personal information without evidence of wrongdoing. Support for criminal background checks for non-criminal purposes suggests that Kagan may privilege government surveillance authority over individual privacy.

This issue is likely to come up in many cases, including those where individuals may be asked for identity documents though probable cause is lacking.²³ It would be appropriate to ask the nominee her views on the scope of the Fourth Amendment as it applies to the disclosure of personal information and the request for identifying information.

Medical Privacy

While Deputy Director for the Domestic Policy Council under the Clinton administration, the nominee received numerous memoranda regarding medical records and related privacy initiatives. On May 14, 1998, President Clinton issued a memorandum to the heads of executive departments and agencies directing them to “limit[] the government’s collection, use and disclosure of personal information” pursuant to protections afforded in the Privacy Act of 1974 and the *Principles for Providing and Using Personal Information* of 1995. The memorandum recognized that “[i]ncreased computerization of Federal records” could “diminish individual privacy” and laid out policy “ensur[ing] that new information technologies enhance, and do not erode, the protections” afforded by privacy statutes. Kagan received a draft of this memo on May 12, 1998.²⁴ Also on May 14, 1998, the Clinton Administration issued a “privacy action plan” that would restrict “how medical records are disclosed and how people can find out about their use,” create an opt-out Web site which would allow individuals to prevent information from being passed to others,” and hold a “‘privacy summit’ which will

²⁰ Unidentified Memorandum, Preparing America for the 21st Century, January 28, 1998, ARMS/TRP Email – Composed, Boxes 11-16, 1595, available at <http://www.clintonlibrary.gov/textual-Kagan-COMPOSED-EMAIL.htm>.

²¹ Elena Kagan & Bruce Reed, Memorandum, March 12, 1997, in Clinton Presidential Records Box 31, Folder 8, 76, available at http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%2031-38/178_DOMESTIC%20POLICY%20COUNCIL%20BOXES%2031-38.pdf.

²² Unidentified Memorandum, Preparing America for the 21st Century, January 28, 1998, ARMS/TRP Email – Composed, Boxes 11-16, 1595, available at <http://www.clintonlibrary.gov/textual-Kagan-COMPOSED-EMAIL.htm>.

²³ See *Hiibel v. Sixth Judicial District*, 542 U.S. 177 (2004).

²⁴ Memoranda, in Clinton Presidential Records Box 8, Folder 13, 2-5, available at http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%20517/DOMESTIC%20POLICY%20COUNCIL%20BOXES%20-30_Part67.pdf.

include members of the Administration and industry officials, who will discuss privacy issues on the Internet.”²⁵

The Clinton Administration submitted Guidelines for the Collection and Tracking of Information from Children on the GII and in Interactive Media to the Federal Trade Commission in 1997. These Guidelines laid out four requirements with which all information collectors and trackers had to comply. Kagan’s notes observed that the Privacy Principles apply to the collection and tracking of information from children, as laid out in the first guideline stating that “[d]isclosure must be full and effective.”²⁶

We take her comment on that initiative to suggest that the nominee recognizes that disclosure alone is inadequate to safeguard personal information, but perhaps this not what she intended. Some discussion of her views on privacy in the consumer context could be illuminating.

Consumer Privacy

In 1998, during Kagan’s tenure as Domestic Policy Council for the Clinton Administration, the nominee received numerous faxes and e-mails regarding the Administration’s comprehensive meeting on consumers’ right to privacy, held in July of that year. Though e-mails indicate Kagan was not able to attend the meeting,²⁷ her working file indicates that she was briefed on, and provided comments relating to, the topics covered in the meeting. Topics covered in the July meeting included: discussions on the creation of a privacy entity, dialogue about privacy protection with state and local governments, educating the public on privacy, information about children, financial records, identity theft, medical records, online privacy, and profiling.²⁸ Given the importance of consumer privacy, it would be helpful to know whether the nominee favored these initiatives.

In other related areas, her record is more favorable for privacy interests. Kagan expressed support for privacy protections as part of the Administration’s health care agenda, including “consumer protection reforms (to ensure quality, prevent discrimination, and protect privacy).”²⁹ She also expressed support for “privacy protection legislation, which would establish strong federal standards to ensure the

²⁵ *Id.* at 6.

²⁶ *Id.* at 68.

²⁷ E-mail, in Clinton Presidential Records Box 6, Folder 1, 7-8, available at <http://www.clintonlibrary.gov/KAGAN%20E-Mail%20SENT/ARMS%20-%20Box%20006%20-%20Folder%20001.pdf>.

²⁸ Memorandum, in Clinton Presidential Records Box 8, Folder 12, 2-28, available at http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part66.pdf.

²⁹ Email, Kagan (co-written with Bruce Reed), to Erskine Bowles, Sylvia Mathews, John Podesta, “Long-Term Strategic Planning,” August 26, 1997, in Clinton Presidential Records, ARMS/TRP Email – Composed, Boxes 11-16, 1447, available at <http://www.clintonlibrary.gov/textual-Kagan-COMPOSED-EMAIL.htm>.

confidentiality of medical records.”³⁰

Solicitor General

During her term as Solicitor General, Kagan filed briefs arguing for reversal of two important lower court opinions that helped safeguard privacy. In these case, she asserted the government’s prerogative to search and seize all information intermingled with data that is the subject of proper government search.

As Solicitor General, Kagan first argued against limitations on government searches of digital data shortly after taking office. On November 23, 2009, an en banc panel of the Ninth Circuit decided *Comprehensive Drug Testing, Inc. v. United States*.³¹ *Comprehensive Drug Testing* concerned the federal investigation into steroid use in Major League Baseball. During the investigation, players submitted to anonymous drug testing through their player’s association in order to determine what percentage were using steroids. However, when ten players tested positive, the federal government subpoenaed both the samples and information from the private entities that performed the test. In doing so, the government collected the information of many more players besides those who tested positive for steroids.³²

This prompted the Ninth Circuit to issue five guidelines for electronic searches by law enforcement:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.
2. Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.
3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.
4. The government’s search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.
5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.³³

After the ruling, Kagan asked for the full Ninth Circuit to rehear the case. In her

³⁰ Memorandum to the President, Kagan (with Bruce Reed, Gene Sperling), “State of the Union Ideas,” November 25, 1997, in Clinton Presidential Records, ARMS/TRP Email – Composed, Boxes 11-16, 1595, available at <http://www.clintonlibrary.gov/textual-Kagan-COMPOSED-EMAIL.htm>.

³¹ 579 F.3d 989 (9th Cir. 2009).

³² *Id.*

³³ *Id.*, at 1006.

brief, she characterized the rules as being overly restrictive on law enforcement. She argued that the required use of independent personnel to segregate data was unfeasible and that such rules undermine the ability of law enforcement to effectively catch criminals. Finally, she asserted that the court had stepped outside the bounds of its function and opposed the guidelines to safeguard personal privacy.

After *Comprehensive Drug Testing*, Kagan again took the opportunity to argue for expansive government searches of digital data. In *City of Ontario v. Quon*, the Supreme Court was confronted with the question of whether a SWAT team member who was issued a city-owned pager maintained any expectation of privacy in the content of messages received by the pager when the city's explicit policy was that all communications on city owned equipment were subject to review and might be made public. In *Quon*, the city decided to undertake a review of all messages sent to the pager to determine if the character limit for messages was adequate for work purposes. In doing its review, the city requested the full transcript of all messages sent to Quon's pager, and subsequently uncovered many private messages between Quon and several women, including his wife.

EPIC filed an amicus brief with the Court in *City of Ontario v. Quon* arguing that the city's review of the full transcript of the messages sent to Quon's pager was unnecessary, and that the same review could have been conducted through less invasive means.³⁴ Kagan also filed an amicus brief; but she arguing the opposite of EPIC's position: "The proper analysis asks not what methods the City could have chosen, but whether the methods the City in fact chose were appropriate to effectuate its purpose. The City met that standard."³⁵ Again, Solicitor General Kagan's office argued that the government has no obligation to limit its searches in order to protect individual privacy interests.

The amount of information stored on digital devices is ever increasing. Therefore, it is vital that the nominee clarify her views on what measures are necessary to protect privacy during government searches of digital data.

Similarly, the importance of assuring accuracy in computer-based decision-making remains a key concern and implicates fundamental rights of procedural fairness. In the *Herring* case, EPIC noted in our amicus brief that errors in the watch list database may have contributed to the decision that led to Maher Arar's unjust rendition to Syria.³⁶ The Supreme Court had the opportunity to review the Arar case, yet chose not to do so, possibly relying on the recommendation of the Solicitor General. As Chairman Leahy noted, following the decision of the Supreme Court not to review the case:

³⁴ Brief of *Amici Curiae* Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts in Support of Respondents, *City of Ontario v. Quon*, 2010 WL 2400087 (2010) (No. 08-1332).

³⁵ Brief for the United States as Amicus Curiae Supporting Reversal at 10, *City of Ontario v. Quon*, 2010 WL 2400087 (2010) (No. 08-1332).

³⁶ Brief of *Amici Curiae* Electronic Privacy Information Center (EPIC), Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner, *Herring v. U.S.*, No. 07-513, May 16, 2008, at 33-35. *See generally*, EPIC, *Herring v. U.S.* <http://epic.org/privacy/herring/>.

The United States' secret rendition of Maher Arar to Syria, where he was tortured for nearly a year, remains a stain on this nation's legacy as a human rights leader around the world. We know that Mr. Arar was detained by American authorities, who deported him not to his country of residence, Canada, where he would have been questioned and investigated, but to Syria, a country known for torturing detainees. The Canadian government has publicly cleared Mr. Arar of any links to terrorism, yet the United States has continued to deny culpability in this case, citing the too-often used state secrets privilege. I am disappointed with the Supreme Court's decision to deny certiorari in this case.

It remains unclear what role Elena Kagan played in the decision of her office to oppose the Supreme Court's review of this case. Acting Solicitor General Neal Katyal is named on the brief. Nonetheless, we believe it would be appropriate to ask the nominee her views about this matter.

Open Government

In her tenure as Solicitor General, Kagan submitted briefs in several cases concerning freedom of information and government transparency. Although EPIC is a privacy organization, we are also committed to open government and see little conflict between protecting the privacy of individuals while ensuring access to government records. Hence, in these cases, we believe it is important to consider whether the nominee favors public access to records held by federal agencies.

In *Department of Defense v. American Civil Liberties Union*,³⁷ Kagan argued in favor of overturning a Second Circuit decision³⁸ requiring the Department of Defense to produce photographic records of alleged detainee abuse. She asserted that photographs were exempt from disclosure because the President and his military advisors determined that the most direct consequence of releasing [the photographs] ... would be to further inflame anti-American opinion and to put our troops in greater danger."³⁹ Kagan further argued that, contrary to the Second Circuit's decision, the government need not show danger to a specific individual in order to invoke the exclusion to a Freedom of Information Act request.

In *Consumers' Checkbook, Center for the Study of Services v. Department of Health and Human Services*,⁴⁰ Kagan argued that a disclosure of Medicare claim information for specified locations sufficiently implicated the privacy interests of doctors who received Medicare disbursements to exclude the requested information from disclosure. However, Kagan also asserted that the privacy interest should be weighed against the contribution of the information to public understanding of the operations or

³⁷ 130 S. Ct. 77 (2009).

³⁸ 543 F.3d 59 (2nd Cir. 2008), *rev'd* 130 S. Ct. 77 (2009).

³⁹ Remarks Prior to Departure for Tempe, Arizona, Daily Comp. Pres. Doc. 2009 DCPD No. 00359 (May 13, 2009) 2, *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-200900359/pdf/DCPD-200900359.pdf>.

⁴⁰ 130 S. Ct. 2140 (2010).

activities of the government. The nominee should clarify whether such a balancing is always appropriate when a government agency invokes an exemption to a Freedom of Information Act request.

In two other cases, Solicitor General Kagan argued against disclosure of the records sought. *Loving v. Department of Defense*⁴¹ concerned a request for documents relating to the President's review of a military death sentence, and *Berger v. Internal Revenue Service*⁴² involved a request for an IRS officer's time sheets.

Conclusion

In the 2005 hearing for Chief Justice John Roberts, then Senator Biden stated:

We will be faced with equally consequential decisions in the 21st century. Can a microscopic tag be implanted in a person's body to track his every movement? There is actual discussion about that. You will rule on that, mark my words, before your tenure is over. Can brain scans be used to determine whether a person is inclined toward criminality or violent behavior? You will rule on that.⁴³

Since 2005, the use of RFID tags in identity documents has become more widespread in the United States.⁴⁴ So, too, has the use of brain scans in criminal trials.⁴⁵ The Supreme Court is likely to confront an increasing number of technologically related privacy issues in the years ahead.⁴⁶ Exploring the nominee's views of this area of law is

⁴¹ 130 S. Ct. 394 (2009).

⁴² 129 S. Ct. 2789 (2009).

⁴³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15-18 (2005) (statement of Sen. Joe Biden, Member, S. Comm. On the Judiciary), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/15-18.pdf>.

⁴⁴ United States Citizenship and Immigration Services, *USCIS To Issue Redesigned Green Card*, May 11, 2010, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=79bd3893c4888210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> ("Radio Frequency Identification (RFID) capability will allow Customs and Border Protection officers at ports of entry to read the card from a distance and compare it immediately to file data."); LaserCard, *LaserCard Supplies Next Generation 'Green Cards' Introduced by U.S. Department of Homeland Security*, May 12, 2010, <http://www.lasercard.com/lasercard.php?key=328> (noting that the new card includes, "for the first time, a Radio Frequency Identity (RFID) tag"); See generally, EPIC, *The 'Green Card' or Permanent Resident Card*, http://epic.org/privacy/green_cards/the_green_card.html (last visited June 28, 2010).

⁴⁵ See *Roper v. Simmons*, 543 U.S. 551 (2005) (accepting neuroimaging evidence for purposes of capital mitigation in a case challenging Florida's state law permitting the death penalty for juveniles under the age of 18 at the time they committed the capital offense; *Hoskins v. Florida*, 965 So. 2d 1 (Fla. 2007) (admitting PET scan as evidence of brain abnormality); *U.S. v. Rodriguez*, 389 F. Supp. 2d 1135 (D. N.D. 2005) (admitting clinical evidence of future dangerousness); *U.S. v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (admitting actuarial evidence of future dangerousness). See also Brent Garland, ed., *NEUROSCIENCE AND THE LAW* (2004).

⁴⁶ See Jeffrey Rosen, *Roberts v. The Future*, N.Y. Times Magazine, Aug. 28, 2005; See also, Jeffrey Rosen, *The Brain on the Stand*, N.Y. Times Magazine, Mar. 11, 2007;

important and necessary.⁴⁷

Respectfully,

Marc Rotenberg
President, EPIC

Deborah Hurley
Chair, EPIC

Grayson Barber
Grayson Barber, LLC

Rebecca MacKinnon
Visiting Fellow, Princeton Center for Information Technology Policy

Pablo Molina
Associate VP of IT and Campus CIO, Georgetown University

Peter G. Neumann
Principal Scientist, SRI International Computer Science Lab

Helen Nissenbaum
Professor of Media, Culture & Communication, NYU

Deborah C. Peel, MD
Founder, Patients Privacy Rights

Chip Pitts
President, Bill of Rights Defense Committee

Bruce Schneier
Founder and Chief Technology Officer, BT Counterpane

Edward G. Viltz
President, www.InternetCC.org

Christopher Wolf
Co-chair, Future of Privacy Forum

⁴⁷ Adam Liptak, *Study Find Questioning of Nominees to be Useful*, N.Y. Times, June 28, 2010, at A10, available at <http://www.nytimes.com/2010/06/28/us/politics/28questions.html>. See also, *Editorial - Elena Kagan's Moment*, N.Y. Times, June 28, 2010, at A18, available at <http://www.nytimes.com/2010/06/28/opinion/28mon1.html> (“ . . . she arrives for her Senate hearings Monday as one of the most enigmatic nominees for the Supreme Court in recent memory. . . . Both parties should cast aside their talking points and try to illuminate the authentic mind of Elena Kagan.”)