

# Kagan's Commerce Clause

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## ABSTRACT

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## FULL TEXT

The Senate kicks off hearings today on Elena Kagan's nomination to the Supreme Court, and perhaps after hours of Senatorial oration we might even learn something about the judicial views that the Solicitor General has been so careful to hide over her career.

One thing we've discovered from the prelude to her nomination concerns the limits of Congressional power -- or, to be more accurate, her view that Congress has virtually no limits on its regulatory power under the Constitution's Commerce Clause.

Ms. Kagan worked in the Clinton White House as associate counsel and deputy director of the Domestic Policy Council, and in those jobs she had to render legal advice. One example is a 1996 memo to then-Deputy Chief of Staff Harold Ickes on the Supreme Court's decision in *Seminole Tribe v. Florida*, which involved the rights of Indian tribes to sue states in federal court. Ms. Kagan wrote critically of the Supreme Court's Commerce Clause jurisprudence at the time and what she called its "state's rights agenda."

She singled out for disdain the High Court's 1995 ruling in *U.S. v. Lopez*, which is a seminal case in limiting Congress's power under the Commerce Clause. The decision limiting the ability to sue the states in *Seminole Tribe*, she wrote, "especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools [in *U.S. v. Lopez*], indicates a serious effort by a bare majority of the Court to reorient the balance of power between the federal government and the States."

In fact, the Lopez line of cases is best understood as a very modest attempt by the Court under Chief Justice William Rehnquist to salvage some Constitutional limit on Congress. A second memo from Ms. Kagan and Bruce Reed during those White House years likewise criticized a Fourth Circuit appeals court decision that allowed victims of domestic violence to "sue their attackers only under state tort laws and in state courts," rather than under federal civil rights law, a judgment they considered ripe for Supreme Court review.

Ms. Kagan's views matter in particular because one of the most important cases she'd confront on the Court is the legal challenge by some 20 states to ObamaCare. They are challenging that law on grounds that if Congress can compel all Americans to buy health insurance then there is nothing left of the Constitution's government of limited and enumerated powers.

If Ms. Kagan disdains Lopez, she is all but certain to rule against the states on ObamaCare. On this point, someone should ask Ms. Kagan whether Congress has the power to force individuals to buy certain cars -- say, Chrysler's, now that the U.S. taxpayer has bailed out that auto maker?

Modern Supreme Court nominations have been dominated by such contentious social issues as abortion and gay marriage. But with the Obama Administration's radical expansion of government, fundamental questions about the limits of federal power deserve to come to the fore. The Supreme Court has a vital role to play in defending individuals and the states against excessive Washington control. If Ms. Kagan believes the Commerce Clause can justify nearly any Congressional decision, this is reason alone to justify a vote against her confirmation.

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