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Letters

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July 13, 2001

Senator Edward M. Kennedy
428 Dirksen Senate Office Building
Washington, DC 20510-6300

Dear Ted:

I'm writing about a former student of mine, Eugene Scalia, who has been nominated to be Solicitor of Labor. I know Gene well, and I think he's an excellent choice -- first-rate, and not at all an ideologue.

There's no issue about competence. Gene was a sensational student at Chicago, one of our very best. Though he's low-key, and modest, he has a terrific legal mind. But his abilities go well beyond that. He was elected Editor-in-Chief of the law review, not only because he's so smart, but also and maybe even more because he is a wonderful human being, and really able to get along with all kinds of people. In terms of sheer capacity to do a fine job, he's as good a choice as could be imagined.

Gene isn't, by nature, an ideological person. I had him as a student in several courses, and I couldn't really tell whether he was liberal, conservative, or somewhere in between. He was just an excellent young lawyer. We do attract our fair share of ideological students here at Chicago, most of them conservative; Gene wasn't that type at all. He was the furthest thing from rigid. On several issues, he took positions that were hardly right of center. As Editor-in-Chief of the law review, he was entirely nonideological. For example, he commissioned not one but two reviews of Judge Bork's book -- and both of the reviews were very sharply negative! On the basis of his superb performance as a student, I would expect him to be an outstanding public servant -- and to be someone who would take very seriously the interests of working people in America.

I understand that some questions have been raised about Gene, mostly because of his opposition to OSHA's ergonomics regulation. While I haven't followed his career closely since graduation, I am confident that this opposition should not be disqualifying, if his record is taken as a whole. Consider, for example, the fact that Gene has written a strong piece on sexual harassment, refusing to take the route, easy for some pro-employer types, of condemning the perceived excesses of the law, and choosing instead to clarify the law, in a way that should result in some significant advances for analysts and even plaintiffs.

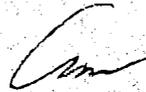
Judge Guido Calabresi, perhaps the most distinguished Clinton appointee to the lower courts, recently cited Gene's article with approval.

Or consider the fact that in writing for the Harvard Journal of Law and Public Policy, for the new President, Gene refused to take the route, easy for some Bush enthusiasts, of hammering on some political theme. Instead he produced a highly creative, and essentially nonideological, proposal: In some cases, unions should be allowed to waive certain statutory protections, if unions believe that the waiver is in the interest of workers. Gene's basic complaint is that the law intrudes more than it should into the domain of unions; he thinks that with certain safeguards, unions might be able to work out especially good deals for American workers -- and that they should be allowed to try. I do not know if I agree with everything Gene says here, and it is clear that reasonable objections can be raised. What is impressive about the article is the independence of mind that it shows, the sensitivity to competing views, the willingness to listen and to learn, and the avoidance of the sorts of right-wing cliches that one might perhaps fear for someone nominated to be Solicitor of Labor.

All in all, I think that Gene Scalia is likely to be a terrific public servant, one who would serve the interests of the nation as a whole and American workers in particular. In fact I am confident that Gene would be an extremely effective advocate for workers' interests. I hope that these comments are helpful and would be delighted to talk at any time.

Very best wishes to you.

Sincerely,



Cass R. Sunstein

October 9, 2001

Dear Chairman Kennedy and Senator Gregg:

All of us previously served as Solicitor of Labor. All of us, either prior to serving as Solicitor or afterward, have had a private law practice dedicated principally to representing business in labor and employment matters. We are writing to express our enthusiastic support for the nomination of Eugene Scalia, and to address one issue that arose during Mr. Scalia's confirmation hearing.

Eugene Scalia would bring exceptional qualifications to the position of Solicitor. We are unaware of any prior Solicitor nominee with his combination of academic accomplishment, prolific writing on labor and employment matters, and many years' practice as a labor and employment lawyer. Two of us also know Gene personally, and believe him to be a person of the utmost integrity. None of us doubts that he will enforce the labor and employment law vigorously, as he pledged during his confirmation hearing. And while we all believe he will listen respectfully to the positions of lawyers for business, employees, and unions alike, we also recognize – with some trepidation – that he will be a formidable courtroom adversary for us and our corporate clients.

During the hearing, some Senators expressed concern that Mr. Scalia might not effectively enforce laws intended for the protection of employees, given that his practice so far has been dedicated primarily to representing business. Based on our own experience, we believe that concern is misplaced. Some of us represented businesses before entering the Solicitor's Office, and all of us have represented business since. Never while in government did we perceive that the effectiveness with which we pursued matters was diminished by the fact we had not previously represented employees.

To our knowledge, moreover, never before has past representation of employees been made a prerequisite for service as Solicitor. Instead, the Senate has placed confidence, as it should, in a lawyer's obligation to zealously represent his or her current client – in this case, the Department of Labor and its various agencies. A litmus test for the Solicitor position based on a lawyer's past client representations would have some serious unintended consequences. First, it would to a degree unfairly favor one side of the labor and employment bar, since lawyers who represent employers seldom represent employees also, and vice versa. Second, the logic of such a litmus test would lead to the disqualification of union lawyers since one important function of the Solicitor's Office is to address allegations of union mismanagement and corruption under the Labor-Management Reporting and Disclosure Act of 1959. If a lawyer who to date has only taken business's side in OSHA matters cannot be trusted to prosecute OSHA cases, can a lawyer who took only the union's side in LMRDA cases be trusted to represent the government in cases under that law? For that matter, do we not all want a Labor Solicitor who can see the management side of a matter as well, and can we expect that from someone who has only represented individual plaintiffs?

October 9, 2001

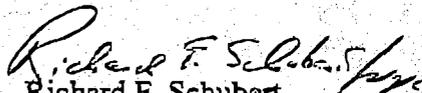
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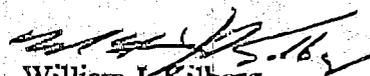
The truth is that all good lawyers – which Mr. Scalia undeniably is – are trained to understand the perspective and concerns of all other parties to a case. A plaintiff's lawyer who does not know the company's views and objectives will be unable to anticipate and respond to its arguments. A corporate lawyer who is unable to appreciate a plaintiff's loss will come across poorly to judge and jury and will be unable to anticipate his opponent's case. That is why people say there is value to "knowing one's adversary," and just as we believe that our past government service has enabled us to more effectively represent business in dealing with the government, so we believe that having represented a business in the past, and understanding how a corporation operates, can at times enhance a prosecutor's effectiveness.

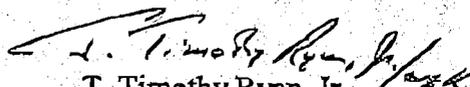
We believe that a final aspect of Mr. Scalia's career is noteworthy in this regard. In representing businesses he also spent a fair amount of time counseling them on their obligations under the labor laws, as he testified in his hearing. Frequently, this work can cause a lawyer to function as the employee's advocate, explaining to management that an action they took or intend to take is volatile of employee rights. Additionally, we are struck that Mr. Scalia has done a significant amount of law review writing that reflects sensitivity toward civil rights plaintiffs and employees, and respect for labor unions. The United States Senate will find many lawyers who represented business and who, on their personal time, wrote articles favorable to businesses' positions. To be sure, Mr. Scalia did this. The Senate will find relatively few lawyers, however, who represent business and spent considerable time writing articles favorable toward civil rights plaintiffs, employees, and unions. Yet Mr. Scalia did this, also.

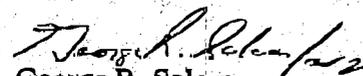
For all the foregoing reasons, we hope that the Committee and full Senate will speedily vote to confirm Eugene Scalia as Solicitor of Labor.

Very truly yours,


Richard F. Schubert
Solicitor, 1971-1973


William J. Kilberg
Solicitor, 1973-1977


T. Timothy Ryan, Jr.
Solicitor, 1981-1983


George R. Salem
Solicitor, 1985-1989


Robert P. Davis
Solicitor, 1989-1991