

JAY SEKULOW LIVE!
01.05.05

Jay: This is Jay Sekulow. The nominee for Attorney General, Al Gonzales, to appear before the Senate Judiciary Committee.

Gene: This is *JAY SEKULOW LIVE!* From Washington, Chief Counsel of the American Center for Law and Justice (ACLJ), Jay Sekulow.

Jay: Welcome to the broadcast, everyone. Tomorrow there are going to be hearings before the Senate Judiciary Committee with Alberto Gonzales. He is currently the White House Counsel. He's the nominee by President Bush to fill the role of Attorney General. Of course, there is already controversy; the controversy is surrounding some memos that were issued, looked at and reviewed by the White House Counsel's office by what are being called "torture issues," which is really not the case at all. We'll get into that in a moment.

Let me just say at the outset here that I have had the privilege and pleasure of working with Judge Gonzales for the last four years, especially on judicial nomination issues, the Patriot Act, and a number of other significant legal matters, and I have found him to be an exceptionally bright lawyer. He was a great judge and served very well on the Texas Supreme Court. He has lived the American dream as far as being from a family of immigrants, then going to Harvard Law School, serving as counsel to the President of the United States. I think he's going to make a really great Attorney General, and I think this is partisan politics not only at its worst, but, unfortunately, at its typical type right now—that is, this idea that *anything* that looks like a nominee of somebody who's conservative and well qualified is going to be put up with a fight. They're trying to send a message here, and we need to be sending a message back.

Gene: There is an interesting piece in *The Washington Times* today, Jay. Several members of the Senate Judiciary Committee, some friends of yours, indicate that this really isn't about Judge Gonzales; it's about President Bush. These are the words of Senator Orrin Hatch, the outgoing Chairman of the Senate Judiciary Committee. It isn't really Judge Gonzales they're after; it's the President. There is a desire to hurt President Bush—that, from Sen. Orrin Hatch.

Jay: Part of this is a warm-up, quite frankly, to the expected vacancy in the Supreme Court of the United States. This is a mobilization effort on behalf of those organizations to get their people involved in the process. So they are going to use Al Gonzales as the first one up. Here's a guy who is literally the first Hispanic appointed to this high office in our nation's history. You would think the American people—this is the best of America; this is where we are the best—and the end result in this particular case, unfortunately, is a drastic overreaction based on these memos, but these memos do not advocate torture. Look at the international law and how it's applied. We filed briefs on this at the Supreme

Court of the United States with our offices in Europe and what the memos talk about is the lack of applicability of The Hague Treaties and the Conventions as they relate to terrorists. It didn't advocate committing terrorists' acts or torture on these prisoners, it simply stated what the law is. The job of a lawyer is to state, "Here's what the law is. Here we think the law is going to change." To say this is an overreaction is an understatement.

Gene: Our phone lines are open for your questions for Jay right now at 1.800.684.3110. That's the studio line. Give us a call at 1.800.684.3110.

Let's go to Scott on the line in California. Go ahead, Scott, you're on the air.

Scott: Jay, I appreciate everything you are doing for everybody. My question is, on the judicial nominees, what month does it have to be if they're going to do the rule change, when would it have to occur by? Would Gonzales fall under the same type of filibuster-type situation where he would be put under that same thing? If they do the rule change, do they have to have it come to a vote--like to the Senate or somebody else voting where it could be turned down?

Jay: It's not the same filibuster because there is a difference between a judicial filibuster and this filibuster from a technical standpoint, but it falls within that same filibuster parameter in that you don't have (and I'd say unfortunately here) the rule change in place yet. Now the rule change can take place on the judicial nominations and only apply to the judicial nominations and not Judge Gonzales. Look, I think Judge Gonzales is going to be confirmed. I don't see a filibuster here. Believe me, they're saving their filibusters for these judicial nominations; there's no doubt about that.

Gene: Jay, yesterday more than 1,500 people called in requesting their free copy of our new booklet *Foundations of Freedom*; very encouraging.

Jay: It is! I want to encourage you if you have not yet obtained a copy of *Foundations of Freedom*, to call today. It has the Constitution, the Bill of Rights, the Declaration of Independence, and the Gettysburg Address. It's in a great readable format. You need to order your copy right away.

Gene: Get your free copy now by calling this toll-free number at 1.877.989.2255. *Foundations of Freedom* put together especially for you, free of charge. *Foundations of Freedom*. Call right now. 1.877.989.2255. Stay with us. Much more ahead.

[*Foundations of Freedom* Spot; *The Logan Show* Spot]

Jay: Welcome back to the broadcast, everyone. You know, we had a great victory the other day in a Ten Commandments case out of the Seventh Circuit Court of Appeals; a 2-1 decision in our favor. This was the case involving La Crosse, Wisconsin; but significantly involving the Fraternal Order of Eagles. In this particular case, what

developed that was very significant was the Fraternal Order of Eagles actually owns the monument. The city had sold the property to the Fraternal Order of Eagles in order for there not to be these constitutional challenges. The court recognized it as the legitimate sale that it was. Of course, the ACLU and the Freedom From Religion Foundation are all arguing that this is nothing but “a sham,” as one of their reports said, and they’re going to take it to the full Seventh Circuit Court of Appeals. But it was a really important win and a very timely one as well.

Gene: Jay, when you look at what the Seventh Circuit said, they said that the sale of that property—the sale of the monument to the Eagles themselves—was constitutionally appropriate; and that was a very important finding.

Jay: The most important finding was for the court to say what the city did was constitutional. It really does set the stage for it these Supreme Court cases don’t go the way we’d like—I think they are going to be close calls—they may give us some other room to keep these historic monuments in place.

Gene: Jay, there was also some concern and surprise among some that the Seventh Circuit actually issued its ruling in the La Crosse case instead of waiting to see what the Supreme Court of the United States will do.

Jay: I wasn’t that surprised because it wasn’t so much the display of the property of the monument, although that was obviously the main part of the case, but also the sale of the real estate and can a city do it and distance itself in that way without violating the Constitution; and they said, “No problem.” So, that was good.

Gene: Let’s go to Jaime on the line in Michigan. Jaime, your question, please for Jay.

Jaime: Hi Jay! My son goes to a public school and he has a religious medal that he wears on his neck about the size of a quarter, and I am wondering if he’s allowed to have a cross or religious medal in school.

Jay: Absolutely. In fact, we had a case last year at the Supreme Court of the United States involving the free speech rights of students; and Jaime, we won that case unanimously. It was part of the campaign finance case, but we actually represented minors—teenagers primarily—who wanted to exercise free speech rights in the political process. But the Court decided the case based on a famous decision issued in 1969, the *Tinker* case, where that famous line, “neither teachers nor students surrender their rights to freedom of speech at the schoolhouse gate,” came from. That was obviously a very significant win for us, and we were very pleased.

Gene: Randy’s now joining us from Colorado. Randy, welcome to the broadcast. Go ahead, please, with your question for Jay.

Randy: Yes, I don't know if it's a question as much as a comment, but I think when the ACLU was originally formed in the United States roughly 100 years ago, my understanding that in their original manifesto, they unashamedly state that they are dedicated to the overthrow of the American way of life through the court system.

Jay: Look, there's no doubt about it. They don't even run from their own history, Randy. It was founded by Roger Baldwin, basically an affiliate of the Communist Party. I'm going to have Pat Monaghan, our Senior Counsel from the American Center for Law and Justice come in here in the second part of the program, and we're going to talk a little bit about this. Absolutely. They don't run from their history. Does that mean they don't have the right to exist. No, they have the right to exist; they have the right to litigate and file lawsuits; but we have the right and the capability to respond to these cases.

Gene: We have a great user poll up on our website with a new question that simply states: "Which issue concerns you most when it comes to the position of the ACLU?" and we list four issues. We want you to select the top one: limiting government's power in the War on Terrorism, protecting abortion, removing displays of the Ten Commandments, and challenging regulations for online pornography. All are very important positions that the ACLU is taking, Jay.

Jay: The poll results we are getting are really fascinating. Of course, I can't let you know what those are. By the way, once you do register and vote, you do get to see the results; but it's very interesting what American citizens around the country are concerned with right now. We encourage you to participate. These user polls are very, very helpful to us, to members of the Senate and Congress, to the White House, to the Justice Department and others. We encourage you to participate at www.aclj.org.

Gene: Let's go to Ohio with Jason. Jason, go ahead, please. Your question for Jay.

Jason: Good afternoon! I was wondering if it's true that churches need to become incorporated to protect themselves and their members from frivolous lawsuits.

Jay: I can't give individual advice on a church-by-church basis, but in my view, incorporating is a good idea. In Virginia, they don't even allow it right now—I think they are amending that provision and they may have just passed it; it was being debated just a few months back. But most states do allow churches to incorporate; and certainly, from a liability standpoint, it always helps to have what's called a "corporate shield." That's why corporate existence is structured that way. But one thing I want to make clear, Jason, and we've had a number of calls in the last couple of months from pastors around the country, the fact that you incorporate does not mean that you have to file for a 501 (c)(3) recognition. Churches are *automatically* tax exempt under Section 508 of the Internal Revenue Code.

Gene: Jay, what's the distinction there? I mean, you just mentioned the Internal Revenue Code, and people always call wanting to know whether or not they need to file a special exemption here.

Jay: And they don't. Churches are automatically exempt. Now some churches choose to go through the process, and that's fine. But churches are automatically exempt. If you are a legitimate operating church performing functions that would normally be performed within the context of a congregation, you are qualified automatically under Section 508 of the Internal Revenue Code. Now that doesn't apply to Christian ministries. That applies to churches, synagogues, mosques, more of the worship facility type of arrangement—not just a Christian ministry. There are different rules for that. So that's where the 501 (c)(3) comes in. But churches do have the right to automatically be exempt under the Internal Revenue Code.

Let me encourage you also, and we'll talk about this in a little bit again, we're getting a lot of great positive feedback on our book *Foundations of Freedom*; if you have not yet joined us in asking for your copy, you *really* need to do this. When we talk about the First Amendment to the United States Constitution or judicial nominations, these are the kinds of things we look at here on this broadcast. This is going to be the textbook, if you will, that we're going to use here on *JAY SEKULOW LIVE!*

Gene: What's nice about this, Jay, is that you've put together three of the most important founding documents—the Constitution, the Bill of Rights, the Declaration of Independence—along with the Gettysburg Address. It's easy to read in a font size that you don't have to squint to see it (laughter).

Jay: Finally! A Constitution of the United States that's in a printable format you can actually read. We're laughing about that here because, normally, people send out nice fancy copies of it, which is great, but you need to read the documents—they're really great to see!

Gene: Get your free copy right now. It's called *Foundations of Freedom*. Just call this toll-free number at 1.877.989.2255. The U.S. Constitution, the Bill of Rights, the Gettysburg Address and the Declaration of Independence—all put together especially for you, free of charge. *Foundations of Freedom*. Call right now. 1.877.989.2255.

Let's go to Line 6. We have Rick joining us in Florida. Welcome, Rick, your question please.

Rick: Good morning! Thank you very much for the great work you do and remember, you only have to do it till the rapture! Anyways, I'd like to know if I, as a citizen, can sue the Democratic Senatorial Leadership for violation of my constitutional rights in regards to Supreme Court and federal judges.

Jay: Are you talking about in the filibuster context?

Rick: Yes!

Jay: Rick, no, you can't. It's interesting there, and that is, when it comes to the impeachment of judges or judgment in case of impeachment shall extend, first of all, no further (and this is in the Constitution; in Section 3, Page 9 of our booklet)—can only be done for a cause. A private citizen can't bring that suit; impeachment proceedings have to be brought by Congress. So, that's Number One. Number Two, the issue of how is a judge removed cannot be based upon the fact that you disagree with their opinion in a case.

And with regard to the filibusters, I think the Senate is going to have to continue to look at modifying its rules. There are a number of ways they can do it. Of course, they have started their session now. They can pass new rules. As individual nominees are actually brought up and there's a filibuster, they can modify and call for what's called "a rule of order motion" and it can be done right from the floor of the Senate. We have detailed this at length on our website at www.aclj.org, so there are a lot of avenues available. Again, the Constitution, when it talks about the confirmation of judges does NOT say it's more than 51. It says 51—a majority.

Interestingly also, Rick, to your question, again on Page 9 of our book, it says the Senate shall have the sole power to try all impeachments. When you have a situation for an impeachment of a judge or someone in office, the Senate is the entity that's in charge of that—not simply individual citizens. Gene, another great reason to get the book *Foundations of Freedom*, because that portion of the Constitution is right there on Page 9.

Gene: Thousands of people are giving us a call toll-free here to get this free copy, Jay. It is something you need to have because we are going to continue to refer to these founding documents and specific citations in these documents as the year moves on, Jay.

Jay: I think it is very important to have this information available and we're going to continue to do that. The idea that we can refer to it specifically in answer to the question we just had about removing judges, the filibusters, and how you deal with all this, it is spelled out in the Constitution, but it is important for American citizens around the country to actually read the documents. I want to encourage you in that regard. I think it's really important.

Gene: We've put together *Foundations of Freedom*. It's the U.S. Constitution, the Bill of Rights, the Gettysburg Address and the Declaration of Independence. All you have to do to get your free copy is call this toll-free telephone number. Do it now. 1.877.989.2255. *Foundations of Freedom*. The toll-free number is 1.877.989.2255.

Jay: When we come back from the break, we're going to be talking about some of the issues related to the ACLU. Pat Monaghan, Senior Counsel with the American Center for Law and Justice, will be joining me right here in the studio.

I also want to encourage you to check out our website this week. As Gene mentioned earlier, there is a great user poll up and we want your opinion there. Also, there's information about our upcoming television broadcast to be seen Friday night on TBN and on the Inspiration Network; and also for the international audience who might be listening to this broadcast through the Internet, Inspiration International is now on the air and we air on Thursday at 6 p.m., with the time obviously being different in Europe.

Gene: Back in a moment. Stay with us.

[*The Logan Show Spot; Foundations of Freedom Spot*]

Jay: Welcome back to the broadcast, everyone. A lot of discussion in the news right after the holidays because of the ACLU and cases they filed, especially a number of cases they filed involving the holiday season. We were able to get all of ours basically resolved very quickly and very successfully, so we were pleased with that. But there have been a lot of questions about the ACLU. In that regard, I've asked our Senior Counsel Pat Monaghan to join Gene and me in the studio, and we're going to talk a little bit about the ACLU. Let's go to a question first, then we'll get Pat in the discussion here.

Gene: Let's go to Ralph from Indiana. Ralph, go ahead, please; your question for Jay.

Ralph: Jay, I've heard that the American taxpayer finances the ACLU. Is that true or if not, who does?

Jay: It's not that they finance the ACLU, it's there is a provision of the Civil Rights Code called Section 1988—it's the attorney fee awards provision. And when the ACLU, or for that matter, the ACLJ, succeeds in a case involving the state or local government, you have the right to get attorney fee awards. I think this is a little misunderstood in one context. It's not as if you're paying for it directly, but, look, if these cities lose a case to the ACLU, sure, there is a challenge, an attorney fees award is paid, and that eventually could come out of taxpayer dollars—usually, it's insurance. There is a move in Congress right now to limit the attorney fee awards in these Establishment Clause cases, the religion cases, and there's a move in Congress on that right now. So, it's not *direct* taxpayer funding, but in a sense it is. But look, we've gotten attorney fee awards, too, on cases, and that's the way the law is structured right now. Now it may be on the Establishment Clause cases Congress does pass that limiting legislation to remove some of these "1988 attorney fee awards." That's where some of the discussion is coming up about these financing issues.

Gene: Jay, but with most advocacy groups, most of their funding comes from people who want to donate to the organization, correct?

Jay: Membership. Look, sure there are attorney fee awards that are issued, but they're usually less than 10% of these organizations. The ACLU's budget in a given year is usually about Supreme Court of the United States \$45 million. I'd say 90% of that comes from

their individual donors. But their background historically, Pat, has been one where they were basically an organization formed initially involving labor and labor protests. They're trying to hide their past in one sense, although lately they've been a little more upfront about it because it's so public.

Pat: Actually, to be a "leftist" has always been sort of fashionable because the elite, so to speak, look on that benignly. Coming to the problem with the attorney fees, though, what really happens there is intimidation. You have local officials who are intimidated—in other words, their homes are put on the line sometimes because they sue them personally—and that intimidation causes them to almost want to just back up and not even mention God or the cross or anything religious.

Jay: It's an overreaction in one sense.

Pat: It is because they make it personal. They are going after them personally. They are actually being sued officially and personally. Particularly, sometimes in these Ten Commandment cases, you know you have a farmer who is donating his time and his effort, and suddenly, he has a small margin of operation and now he's threatened with losing everything.

Jay: It's an intimidation factor. It's a number of issues. But you have to realize this—where we have to meet the ACLU is in the courts of law, in the courts of public opinion (that's why we do programs like this and our television programs) and also in the halls of the legislature (that's why we have an office right across the street from the Senate and the Supreme Court of the United States). So, we have to meet them head-on in these issues. They were involved in the campaign issues; we were involved in campaign issues on the legal front. All of that is part and parcel of our trying to meet them on each of the issues. We usually fundamentally disagree on three or four primary issues:

- ~ The right to life. The ACLU is completely opposed to our position. They actually support partial-birth abortion, which most Americans by a 75% margin think should be outlawed; but the ACLU is one of the big advocates for that.
- ~ The religion cases. As Pat alluded to, whether it is a cross or a nativity scene or a prayer, the ACLU is clearly on the other side on those issues. Oftentimes, when it's anything that has to do with the schools and religions, we generally find them saying, "We're opposed to the Equal Access Act with regard to student speech on campuses."
- ~ Child pornography. The ACLU is in favor of child pornography being legalized, which we think it should be criminalized.

So, pretty distinct differences between our organizations.

Gene: J.C. is on the phone in Texas. J.C., go ahead, please; your question for Jay.

J.C.: Hello! Yes, my sister works at a patients assistance program which provides medicine for low-income and no-income and elderly people.

Jay: What kind of problem is she having?

J.C.: Well, it's not a problem yet, but she has devotional pictures framed and little knick-knacks all over her office. Whenever the patients go in there, there's really no problem.

Jay: Have there been any complaints?

J.C.: No. There haven't been any; but I wonder if there are, is she okay with that or what?

Jay: Well, it depends on the policies of the employer. I will tell you this, though, and I just saw this the other day. Hospitals, when you have the check-in areas where you're meeting with the finance people if someone's having surgery, oftentimes you will see some personal information up there. It may be a Bible quote, a verse of Scripture, and that's perfectly fine. Sometimes employers will overreact. Pat, what you said earlier about the ACLU also will go for some employers who think if they let employees have any religious expression, all of a sudden it's off limits and they might get sued by creating a hostile work environment. Again, this is an overreaction, but it's kind of that ACLU theory, if you will, of intimidating people into silence.

Pat: Every time we turn around and have a case where it makes a headline in the newspaper, we can usually count on the fallout being that you will have some person in a position of authority anywhere just overreacting and taking it farther than the court said or farther than required. It's sort of an irrelevance. It's sort of looking to make a statement that's uncalled for.

Jay: So the answer, J.C., is unless she is being told to remove them and there is a policy, there should be no problem for your sister.

Gene: Jason is joining us now from Washington State. Jason, go ahead, please, you're on the air.

Jason: I was wondering about in the election, they had to deal with--

Jay: Are you talking about the state of Washington election where they had the multiple recounts?

Jason: Yes.

Jay: Okay, well, if you've ever thought about, "Does every vote count?" You found out there that it did. What was the final distinction? Eight votes for the entire state made the difference. It may have gone up to 80, but it was a very small number. They had a

policy, a procedure under state law where they were allowed to do these multiple recounts, and that's exactly what they did. They could do these; and as long as they are complying with state law, they are fine.

Gene: We have Hyme on the line out of California. Welcome to the broadcast. Go ahead, you're on the air.

Hyme: Jay, there's this Circle K gas station in the parking lot from our church. A lot of our church members go over there and buy products from them; but I have been noticing that they have two soft porn magazines right at the front of the counter at the eye level where these kids can see them. It's not really that but you know, at the same time, it's not appropriate to be showing all this kind of stuff right in front of the counter.

Jay: No, and they really shouldn't be doing that because every state, every county and every city has a prohibition to contributing to the delinquency of a minor. And having that kind of material available at a store and minors having access to it or seeing it is not right. Also, it's bad business. Because when you have a situation like this, it's just not good business.

Gene: Michael is joining us from Colorado. Your question, Michael, quickly, for Jay.

Michael: Jay, thanks for the time. As far as when these ACLU representatives get on the radio or television to do a debate or whatever, my question is why is it that the show hosts don't bring up the founding documents for the ACLU so that when the ACLU rep says, "Oh, we're just doing this for the constitutionality—"

Jay: Not only are they not bringing up their ACLU's founding documents, they don't bring up the documents of the United States' founding either. Some hosts are better than others, but this is a big education project for us this year at the ACLJ. The fact is, people need to understand what the First Amendment really does mean. Right, Pat?

Pat: Right. I think you have to realize that the leftism in this country has a social acceptability among the media; so they are really kind of biased and pro-ACLU.

Gene: Get your free copy right now. It's called *Foundations of Freedom*. The U.S. Constitution, the Bill of Rights, the Gettysburg Address and the Declaration of Independence—all put together especially for you, free of charge. Just call this toll-free number at 1.877.989.2255.

Jay: We really want you to have this booklet of information. It will be very, very helpful to you. *Foundations of Freedom*. Call right now 1.877.989.2255.

Gene: That will do it for our broadcast today. Thank you so much for being with us. We will talk to you next time on *JAY SEKULOW LIVE!*