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Senator Amy Klobuchar  
United States Senate  
Committee on the Judiciary  
Washington, DC 20510-6275

Dear Senator Klobuchar:

On July 22, 2015, I testified at a hearing entitled “With Prejudice: Supreme Court Activism and Possible Solutions,” which was held by the Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts. In the wake of the hearing, you asked me to address three questions: (1) what the legal issue was in *Cooper v. Aaron*; (2) what the impact would have been on *Brown v. Board of Education* and the process of desegregation if the Supreme Court of the United States in *Cooper* had ruled in favor of the State of Arkansas; and (3) what the impact would be on the Court’s recent decision in *Obergefell v. Hodges* if the Court in *Cooper* had ruled in favor of Arkansas.

The issue in *Cooper v. Aaron*, 358 U.S. 1 (1958), was whether state officials may succeed in severely undermining U.S. Supreme Court interpretations of the United States Constitution with which they disagree. The backdrop of the case was various actions by the governor and legislature of Arkansas premised on the belief that they were not bound by the Court’s holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), that the Fourteenth Amendment’s Equal Protection Clause prohibits government-mandated racial segregation in public education. Among other things, the governor, in order to defeat desegregation in Little Rock, ordered the Arkansas National Guard to the grounds of Central High School and declared the school “off limits” to African American students.

In light of the violence and turmoil that state officials caused by taking such actions, the Little Rock school board and the superintendent of schools filed a petition in federal district court seeking to postpone their desegregation plan for a period of two and one-half years. On appeal, the Supreme Court denied this request and emphatically “answer[ed] the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case.” The Court rejected the resistance to *Brown* of Arkansas officials by “recall[ing] some basic constitutional propositions which are settled doctrine.” It was an extraordinary, historic opinion that was individually signed by each of the nine Justices.

If the Court in *Cooper* had ruled in favor of the school board and Arkansas officials more generally (collectively “Arkansas”), there would likely have been a devastating impact on *Brown* and desegregation efforts throughout the nation. There was massive resistance to *Brown* in the American South. Had Southern officials learned after *Cooper* that they could succeed in defying, and encouraging defiance of, federal court orders to desegregate, massive resistance may well have prevailed—and the *Brown* Court may have lost its bet with constitutional destiny.

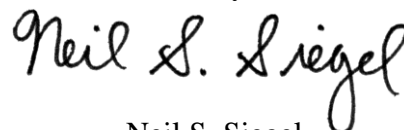
Specifically, had Arkansas won in *Cooper*, segregationist government officials would have been emboldened. Any public entity or official who could afford to invest in litigation would likely have chosen to (even more) substantially delay efforts to implement desegregation. *Brown*’s great achievement was to declare that racially segregated public schools were immediately unconstitutional everywhere for everyone. Approving the school board’s request for delay in *Cooper*—a request that was precipitated by state officials’ own resistance to desegregation—would have significantly undermined *Brown*’s accomplishment, and would have terribly slowed efforts to provide equal citizenship and racial justice in this country. Those efforts were already proceeding far too slowly.

If the Court in *Cooper* had ruled in favor of Arkansas, it is difficult for me to assess what the impact would be on the Court’s decision in *Obergefell v. Hodges*, 576 U.S. \_\_ (2015). I am uncertain how to respond because we would likely be living in a very different nation today had the objectives of the Arkansas governor and legislature been vindicated in *Cooper* and the enduring lesson had been that state officials may succeed in severely undermining Supreme Court decisions with which they disagree. A constitutional regime without *Cooper* is a regime in which state officials who are not parties to a Supreme Court case may ignore the Court’s decision in that case on the ground that they are not bound by it unless and until a federal court enjoins their own specific conduct. Given the piecemeal litigation and guerilla tactics that such an understanding would unleash whenever the Court rendered controversial decisions, the Court today might not possess sufficient constitutional legitimacy to render such decisions—whether they concerned unpopular political speech, minority religious freedoms, the right to keep and bear arms in self-defense, or, indeed, same-sex marriage.

But to respond to your final question in that way is to fight its hypothetical premise. So I will conclude by observing that a ruling in favor of Arkansas in *Cooper* would have risked significantly limiting the real-world impact of *Obergefell* for years to come as each state or local government that disagreed with the decision pursued its own campaign of resistance and forced advocates of marriage equality to serially litigate the issue.

Thank you for your questions. Please do not hesitate to contact me if I can be of further help to you or other Committee members as you execute your responsibilities.

Sincerely,

A handwritten signature in black ink that reads "Neil S. Siegel". The signature is written in a cursive, flowing style.

Neil S. Siegel