

Statement of
The Honorable Richard J. Durbin

United States Senator
Illinois
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JUDICIARY COMMITTEE HEARING: CONFIRMATION OF ELENA KAGAN TO BE A
SUPREME COURT JUSTICE

Monday, June 28, 2010

General Kagan, welcome to you, your family, and friends, and congratulations on your nomination.

This isn't your first hearing on a Supreme Court Justice nominee. If my notes are correct, some seventeen years ago you were sitting at the Senate Judiciary Committee hearing on Ruth Bader Ginsburg's nomination to serve on the Supreme Court. Your capacity was as a staff attorney for the chairman of the committee, Joe Biden.

So you've seen this exercise as a staffer, and now in this revered position as the nominee of the President of the United States.

At that hearing on Justice Ginsberg, my former colleague and friend Paul Simon set forth a standard for assessing Supreme Court nominations which I have mentioned from time to time. He said to Justice Ginsberg, "You face a much harsher judge . . . than this Committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

It's a simple calculus--it was for Senator Simon and it is for me as well.

I used this standard and asked the same question of Justices Alito, Roberts, and Sotomayor. I think it's an important question. Nine men and women on the Supreme Court serve for a lifetime, and they have a significant impact on the lives of every American.

In our most celebrated Supreme Court decisions, we have seen an expansion of freedom: *Brown vs. Board of Education*, *Loving vs. Virginia*, *Griswold vs. Connecticut*. And in the most infamous decisions, restrictions on our freedom: *Dred Scott*, *Plessey vs. Ferguson*, and *Korematsu*.

Now of course, we are in the new generation and a new time, and many questions are going to be raised. I think we have heard repeatedly from the other side of the aisle their loyalty to the concept of traditionalism and their opposition to judicial activism. I have two words for them: Citizens United.

Earlier this year in the Citizens United case, a 5-4 majority of the court demanded to hear arguments on an issue that wasn't posed by the parties in the case; reversed its own precedents; ignored the will of Congress; and ruled that corporations and special interests can spend unlimited amounts of money to affect elections. This decision has the power to drown out the voices of average Americans.

Justice John Paul Stevens wrote in the Citizens United dissent and I quote, "Essentially, five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."

If that isn't judicial activism, what is? And it was espoused and sponsored by men who had stood before us under oath and swore they would never engage in judicial activism.

That is the reality.

There is something that has occurred today that has come as somewhat of a surprise to me. On at least three or four occasions, I have been disappointed by my Republican colleagues warning us that you just might follow in the tradition of Justice Thurgood Marshall.

Well, Ms. Kagan, you deserve to be judged on your own merits. Not on the basis of the strength and weakness or philosophy of any judge for whom you clerked. But before I leave this subject, let me say for the record: America is a better nation because of the tenacity, integrity, and values of Thurgood Marshall.

Some may dismiss Justice Marshall's pioneering work on civil rights as an example of empathy--that somehow as a black man who had been a victim of discrimination, his feelings became part of his passionate life's work--and I say thank God. The results which Justice Marshall dedicated his life to broke down barriers of racial discrimination that had haunted America for generations.

For those who would disparage his life's work on the court and as Solicitor General arguing before court, the record is pretty clear: Thurgood Marshall argued 32 cases before the Supreme Court of the United States and won 29 of them, earning more victories in the Supreme Court than any other individual. And I might also add--his most famous case, Brown vs. Board of Education, if that is an activist mind at work we should be grateful as a nation that he argued before this Supreme Court based on discrimination in this society and changed America for the better.

And I know that my good friend, Judge Abner Mikva's name has been mentioned as well.

I will just say briefly that his political views are not veiled, they are well known--from when he served in Congress and since. But my colleagues will find universal acclaim for Abner Mikva's record as a thoughtful, fair judge of the highest level of integrity and intelligence. We share a high regard for this extraordinary American, and the kind words you've had to say about him.

There will be questions raised, as well, about modesty, humility, and your role, if you are chosen--and I believe you will be--to serve on the Supreme Court. I think a study of judicial

ideology conducted recently by the Seventh Circuit Judge, Richard Posner, in my home state of Illinois is worth noting.

Judge Posner, who is no liberal himself, ranked the 43 Justices who've served on the Supreme Court since 1937 from the most liberal to the most conservative. He concluded that 4 of the 5 most conservative Justices since 1937 are on the Court at this moment: Clarence Thomas, Antonin Scalia, John Roberts, and Sam Alito.

Our Supreme Court is badly in need of a person with your skill, your knowledge, and your background, who can reach across the ideological aisle in pursuit of expanding our freedom. The Court needs as person who has an ability to build consensus and find common ground. Elena Kagan, you are such person.

As a Solicitor General of the United States, you have defended bipartisan laws like McCain-Feingold campaign finance and you have deftly balanced competing interest within the Federal Government.

As Dean of the Harvard Law School, your efforts to reach out to conservative faculty and students are well documented. Professor Charles Fried, who served as President Reagan's Solicitor General and who now teaches at Harvard, praised you for "recruiting excellent teachers from across the ideological spectrum" and for your efforts to "make sure students had every point of view feel as if they were part of an intellectual and professional enterprise."

Professor Fried told the story, which I have recounted, about your speech to the Federalist Society in which you opened by saying, "I love the Federalist Society, but you are not my people!" Well, they took your statement out of context and made t-shirts that they wore around the campus saying, "I Love the Federalist Society" with your name, Elena Kagan, below that. But it is an indication of a friendship and an effort to reach out--even to those whose opinion you might not share.

Earlier in your career you worked as a counselor to President Clinton, working with Republicans to find bipartisan solutions on tough issues like tobacco regulation, religious liberty, and community policing. In the 170,000 pages of documents from your White House service that were turned over to this committee, there is ample evidence of your efforts to bridge the political gaps that haunt us in America.

In closing, I would like to recognize the Justice whom you would replace. Justice John Paul Stevens, a native of Chicago, has been one of the wisest and most accomplished jurists of our time. The third-longest-serving Justice in U.S. history, Justice Stevens' judicial philosophy may be hard to label but his integrity is rock solid. A lifetime in the law and the courage to speak his mind made him a national treasure on our highest court.

General Kagan, I believe you can follow in that tradition. I look forward to your testimony.