

Statement of
The Honorable Ted Kaufman

United States Senator
Delaware
June 28, 2010

Kaufman Opening Statement at Supreme Court Confirmation Hearing
of Solicitor General Elena Kagan

Welcome, Solicitor General Kagan, and welcome also to your family and friends. Like my colleagues, I want to congratulate you on your nomination.

We are now beginning the end of an extraordinarily important process. Short of voting to go to war, a Senator's constitutional obligation to "advise and consent" on Supreme Court nominees is probably his or her most important responsibility. Supreme Court justices serve for life; once the Senate confirms a nominee, she is likely to affect the law and the lives of Americans much longer than the Senators who confirmed her.

As senators, I believe we have an obligation not to base our decision on empty political slogans, or on charges of guilt by association, or on any litmus test. Instead, we should focus on your record and your answers to our questions, which will allow us to determine whether you have the qualities necessary to serve all Americans, and the rule of law, on our nation's highest court.

Over the years, as chief of staff to then-Senator Biden, teaching at Duke Law School, and as a Senator myself, I've thought a lot about the qualities I believe a Supreme Court nominee should have: A first-rate intellect; significant experience; unquestioned integrity; absolute commitment to the rule of law; unwavering dedication to being fair and open-minded; and the ability to appreciate the impact of court decisions on the lives of ordinary people.

Last year, when Justice Souter announced his retirement, and again when Justice Stevens announced his retirement this April, I suggested that the Court would benefit from a broader range of experience among its members. My concern was not just the relative lack of women or racial or ethnic minorities on our federal courts, though that deficit remains glaring.

I was noting the fact that the current Justices all share very similar professional backgrounds. Every one of them served as a federal circuit court judge before being appointed to the Supreme Court. Not one of them has ever run for political office, like Sandra Day O'Connor or Earl Warren or Hugo Black.

General Kagan, I am heartened by what you would bring to the Court based on your experience working in and with all three branches of government, the skills you developed running a complex institution like Harvard Law School, and yes, the prospect of your being the fourth woman to serve on our nation's highest court.

Some pundits, and some Senators, have suggested that your lack of judicial experience is somehow a liability. I could not disagree more. While prior judicial experience can be valuable, the Court should have a broader range of perspectives than can be gleaned from the appellate bench.

General Kagan, you bring valuable non-judicial experience and a freshness of perspective that is lacking on the current Court. In the history of the Supreme Court, more than one-third of the Justices have had no prior judicial experience before being nominated. And a nominee's lack of judicial experience has certainly been no barrier to success.

When Woodrow Wilson nominated Louis Brandeis in 1916, many objected on the ground that he had never served on the bench. Over his 23-year career, however, Justice Brandeis proved to be one of the Court's greatest members. His opinions exemplify judicial restraint and his approach still resonates in our judicial thinking more than 70 years after his retirement.

Felix Frankfurter, William Douglas, Robert Jackson, Byron White, Lewis Powell, Harlan Fiske Stone, Earl Warren and William Rehnquist all became justices without having previously been judges. And they certainly had distinguished careers on the Supreme Court.

As Justice Frankfurter wrote about judicial experience in 1957, "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero."

We've all now had the opportunity to review your extensive record as a lawyer, a policy advisor, and administrator. Throughout your career, you have consistently demonstrated the all-too-rare combination of a first-rate intellect and an intensely pragmatic approach to identifying and solving problems.

Last summer, during then-Judge Sotomayor's confirmation hearing, I focused on the current Court's handling of business cases. I am convinced, by education, experience, and inclination, that the integrity of our capital markets, along with our democratic traditions, is what makes America great. Too often, however, today's Supreme Court seems to disregard settled law and congressional policy choices, in order to promote business interests at the expense of the people's interests.

Whether it's pre-empting state consumer protection laws in *Medtronic*, striking down punitive damages awards in *Exxon*, restricting access to the courts in *Twombly*, or overruling 96 years of pro-consumer antitrust law in *Leegin*, this Court gives me the impression that in business cases, the working majority is business-oriented to a fault.

The *Exxon* case demonstrates how this pro-business orientation can affect the lives of ordinary people. In that case, four of the eight Justices who participated voted to bar all punitive damages in maritime cases against employers like *Exxon* for their employees' reckless conduct.

Justice Alito did not participate in the case, so the Court split four-to-four on this point. But had he participated, and voted with the conservatives on the Court, then today individuals harmed by

oil spills like Exxon Valdez would be subject to a flat ban on punitive damages in maritime actions. As we consider the current disaster in the Gulf, that prospect is worth contemplating.

The Court's decision last fall in the Citizens United case, which several of my colleagues have mentioned, is the latest example of the Court's pro-corporate bent. The majority opinion in that case should put the nail in the coffin of claims that "judicial activism" is a sin committed by judges of only one political ideology.

What makes The Citizens United decision particularly troubling is that it is at odds with what some of the Court's most recently confirmed members said during their confirmation hearings. We heard a great deal then about their deep respect for existing precedent. Now, however, that respect seems to vanish whenever it interferes with a desired pro-business outcome.

As I've said before, charges of judicial activism are often unhelpful - empty epithets divorced from a real assessment of judicial temperament. But that doesn't mean the term "judicial activism" is necessarily meaningless.

If we want to take the term seriously, it might mean a failure to defer to the elected branches of government; it might mean disregard for long-established precedent; it might mean deciding cases based on personal policy preferences rather than the law; or it might mean manipulating a case to get at issues not squarely presented by the parties.

By any of these definitions, the decision in Citizens United was highly "activist." The Court summarily overturned years of settled precedent and statutory law that had limited the influence of corporate electioneering. Moreover, the Court took it upon itself to order that the case be re-argued on broad constitutional grounds, which neither party had asked it to do. In effect, the Justices wrote their own question of the case in order to obtain their desired result.

I share the fear expressed by Justice Stevens in his dissent - that the Court's focus on results rather than the law in this and other cases will do damage to the Court as an institution.

General Kagan, I plan to spend the bulk of my time asking you about the Court's business cases, based on my concern about its apparent bias.

One of the aspirations of the American judicial system is that it render justice equally to ordinary citizens and the most powerful. We need Justices on the Supreme Court who not only understand that aspiration, but also are committed to making it a reality. For Americans to have faith in the rule of law, we need one justice system in this country, not two.

Very soon, those of us up here will be done talking, and you'll have the chance to testify, and then to answer our questions. I look forward to your testimony.

###