

Statement of
The Honorable Herb Kohl

United States Senator
Wisconsin
June 28, 2010

Senator Kohl's Opening Statement on the Supreme Court Confirmation Hearing of
Solicitor General Elena Kagan
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Good morning Solicitor General Kagan. We welcome you today to the Committee and extend our congratulations to you on your nomination.

If confirmed, you will bring to the court an impeccable resume and a formidable track record of accomplishments. And, you will bring a new perspective to the bench, as each new justice does, based on your life and your career. You come before us today not from the halls of our judicial monastery, but with the insight of a scholar and a teacher, and the political, policy and legal acumen of a White House aide, law school dean and the Solicitor General of the United States.

Your encounters with the law- from its technical intricacies to its emotional controversies - have formed the lens through which you will judge the dilemmas of our democracy and the constitutional questions we face. At this hearing, we will try to learn from you how that lens will affect your judgment on the Court.

Should you be confirmed, your decisions will impact our pocketbooks and our livelihoods, and determine the scope of our most cherished rights. From the right to privacy to the right to equal education, employment and pay; From the right to an attorney and a fair trial for the accused to the right to speak and worship freely.

In these difficult economic times, in the wake of what could be the most horrific environmental crisis in our nation's history, and as we continue our fight against terrorism, we are mindful of the great influence you will have on the issues and cases that wash up on the shores of our courts. The questions you will confront are not only concepts for lawyers and courts to contemplate. Behind the volumes of legal briefs are real people with real problems. And beyond the individual parties to each case will stand the rest of us who will feel either the brunt or the bounty of your decisions.

We hear the over-used platitudes from every nominee, that he or she will apply the facts to the law and faithfully follow the Constitution. But, deciding Supreme Court cases is not merely a mechanical application of the law. There will be few easy decisions and many cases will be decided by narrow margins.

You will not merely be calling balls and strikes. If that was the case then Supreme Court nominations and our hearings would not be the high stakes events they are today. But all of these things do matter and we care deeply about the Supreme Court precisely because it rules on only

the toughest and most challenging problems. We can all agree that your decisions will impact society long after you have left the court. Justice Oliver Wendell Holmes put it plainly, "Presidents come and go, but the Supreme Court goes on forever."

That is why it is so important for us to know who you are, Solicitor General Kagan - what is in your heart and what is in your mind. We can gain some insight from your work for President Clinton and Justice Thurgood Marshall. But we have less evidence about what sort of judge you will be than on any nominee in recent memory. Your judicial philosophy is almost invisible to us.

We don't have a right to know in advance how you will decide cases, but we do have a right to understand your judicial philosophy and what you think about fundamental issues that will come before the court. As you said in your own critique of these hearings in 1995, it is an "embarrassment" that Senators do not insist that a nominee reveal what kind of Justice she would make, by disclosing her views on important legal issues.

The President has his vetting process and we in the Senate have our vetting process. But this hearing is the only opportunity for the American public to learn who you are. They deserve to learn about your views and motivations before you don the black robes of a Justice for a lifetime appointment.

For each Supreme Court nomination in which I have participated, I have put each nominee to a test of judicial excellence and your nomination will be no different.

First, a nominee must demonstrate that she has the competence, character, integrity, and temperament necessary for any judge or justice. And that she will have an open mind--not only willing to hear cases with an open mind, but also willing to decide cases with an open mind.

I also look for a nominee to have the sense of values and judicial philosophy that are within the mainstream of legal thought in our country. No one, including the President, has the right to require ideological purity from a member of the Supreme Court. But we do have a right to require that the nominee accept both the basic principles of the Constitution and its core values implanted in society.

Finally, we want a nominee with a sense of compassion. Compassion does not mean bias or lack of impartiality. It is meant to remind us that the law is more than a mental exercise or an intellectual feast. It is about the real problems that will shape the fabric of American life for generations to come.

The great dilemmas of our democracy invite us to engage in a robust debate and my hope is that we can engage in a substantive and candid dialogue that will benefit not only those here on the Committee, but also the public. The American people want and deserve a process that is more than what you characterized as a "vapid and hollow charade" and which so frustrated you 15 years ago.

In a tribute to Justice Marshall, you said that the stories he told to his law clerks served the purpose of reminding you that "behind the law there are stories - stories of people's lives as shaped by the law, [and] stories of people's lives as might be changed by the law." We are gathered here today to hear your stories - how your life has been shaped by the law and how our

lives might be changed by the law when you are on the Court.
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