

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
June 28, 2010

Opening Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Confirmation Hearing On The Nomination Of Solicitor General Elena Kagan
To Be An Associate Justice Of The Supreme Court Of The United States
June 28, 2010

We meet today to consider President Obama's nomination of Elena Kagan for a lifetime appointment to the Supreme Court of the United States. Just last year, this Committee and the Senate reviewed her record, and a bipartisan majority voted to confirm her to be the Solicitor General, the top lawyer representing the United States before the Supreme Court. With her confirmation, Solicitor General Kagan became the first woman in America's history to serve in that position, often referred to as the "Tenth Justice." She was nominated to be Solicitor General while serving as Dean of Harvard Law School, the first woman to hold that position in the school's 193-year history.

There have been 111 Justices in the Supreme Court of the United States. Only three have been women. If she is confirmed, Solicitor General Kagan will bring the Supreme Court to an historical high-water mark, with three women concurrently serving as Justices. Sandra Day O'Connor, who was the first woman nominated and confirmed to the Supreme Court 29 years ago, resigned in 2006. Just one year ago Justice Ginsburg was the sole woman serving on the Court. Justice Sotomayor, who also made history as the first Hispanic Justice, has been a welcome addition to the Supreme Court. Now we are poised to make more progress.

Elena Kagan earned her place at the top of the legal profession. Her legal qualifications are unassailable. As a student, she excelled at Princeton, Oxford and Harvard Law School. She was a law clerk to the great Supreme Court Justice, Thurgood Marshall; worked in private practice and briefly for then-Senator Biden on this Committee; taught law at two of the Nation's most respected law schools; counseled President Clinton on a wide variety of issues; served as Dean of Harvard Law School; and is now the Solicitor General of the United States. We are a better country for the fact that the path of excellence Elena Kagan has taken in her career is one now open to both men and women.

The Constitutional Tradition of Forming a More Perfect Union

It was not until 1920, after a long struggle and the ratification of the 19th Amendment to the Constitution, that women were guaranteed the right to vote. This amendment is part of our great

tradition to further the Constitution's purpose of forming a more perfect Union. We inherited this tradition from the Founders, who, in crafting the Constitution did not presume to have answers for every question that might face future Americans. Had they done so, the Constitution that emerged from the political clamor and compromises of the Founders' time would have been so rigid that it would have bound the hands of later generations from solving the problems of their own time. However, as Chief Justice John Marshall wrote, our Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." He and our other great Justices have recognized that the broadly-worded guarantees and powers granted in the Constitution adapt to changing circumstances.

Consequently, our Constitution has withstood the test of time. The genius of our Founders was to establish a Constitution firm enough to enshrine freedom and the rule of law as guiding principles, yet flexible enough to sustain a young Nation that was destined to grow into the greatest, richest and most powerful Nation on earth.

Our country's historic progress to greater freedom, equality and security for all is an enduring and defining feature of our history. When the Constitution was written, "We the People" did not include African-American slaves or Native Americans but only a narrow band of what were then known as "free Persons." It took more than four score years and a Civil War that claimed the lives of hundreds of thousands to end the enslavement of African Americans and include as citizens "all persons born or naturalized in the United States." Through the Civil War amendments that followed, we transformed the Constitution into one that more fully embraced equal rights and human dignity. The country and our democracy were stronger for it. But the job was not complete. It was halfway through the last century that racial discrimination was dealt a blow by the Supreme Court in the modern landmark case of *Brown v. Board of Education*, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and America began to provide a fuller measure of equality to those who were held back for so long because of the color of their skin.

Our path to a more perfect Union also included the rejection 75 years ago of conservative judicial activism by the Supreme Court and our establishing a social safety net for all Americans. It began with our outlawing child labor and guaranteeing a minimum wage. Through Social Security, Medicare and Medicaid, Congress ensured that growing old no longer means growing poor, and that being older or poor no longer means being without medical care. That progress continues today. All of us are the better for it.

Judicial Philosophy vs. Ideological Litmus Tests

The 100 of us who serve in the United States Senate stand in the shoes of more than 300 million Americans as we discharge our constitutional duty with respect to this nomination. I urge the nominee to engage with this Committee and through these proceedings with the American people in a constitutional conversation about the role of courts and the meaning of our Constitution. We should ask serious questions but in a civil manner befitting the Senate's tradition.

I am no newcomer to the belief that a nominee's judicial philosophy is an important factor in his or her confirmation. I intend to ask Solicitor General Kagan about her judicial philosophy. I

intend to ask, in her words, about her "understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values." That is what I have done through the course of a dozen Supreme Court nominations hearings.

When we discuss the Constitution's commerce clause or spending power, we are talking about congressional authority to pass laws to ensure protection of our communities from natural and man-made disasters, to encourage clean air and water, to provide health care for all Americans, to ensure safe food and drugs, to protect equal rights, to enforce safe workplaces and to provide a safety net for seniors. This hearing is, accordingly, about the fundamental freedoms of all Americans.

The constitutional discussion I hope we will have is part of our great democracy set in motion by the Founders. Like the Founders, we do not know what legal questions will be before the Supreme Court in the decades to come. No Senator should seek to impose an ideological litmus test or to secure promises of specific outcomes in cases coming before the Supreme Court.

I reject the ideological litmus test that some would apply to Supreme Court nominees. I expect judges to look to the legislative intent of our laws and to consider the consequences of their decisions, to use common sense and to follow the law. In my view a Supreme Court Justice needs to exercise judgment, should appreciate the proper role of the courts in our democracy, and should consider the consequences of decisions on the fundamental purposes of the law and in the lives of Americans.

Understanding how the law affects Americans is important because it reflects an understanding of why the law matters. I expect that Elena Kagan learned that lesson early in her legal career when she clerked for Justice Marshall. Constitutional values that need to be applied and cases often involve competing constitutional values. In the hard cases that come before the Supreme Court in the real world, we want - and need - Justices who have the good sense to appreciate the significance of the facts in the cases in front of them as well the real-world ramifications of their decisions.

I urge Solicitor General Kagan to be open and responsive and to share with us and the American people her judicial philosophy and indicate her judicial independence. I believe that fair-minded people will find her judicial philosophy well within the legal mainstream. I welcome questions to Solicitor General Kagan about judicial independence, but let us be fair. Let us listen to her answers. There is no basis to question her integrity and no one should presume that this intelligent woman, who has excelled during every part of her varied and distinguished career, lacks independence.

It is essential that judicial nominees understand that, as judges, they are not members of an administration. The courts are not subsidiaries of any political party or interest group, and our judges should not be partisans. That is why the Supreme Court's intervention in the 2000 presidential election in *Bush v. Gore* was so jarring and wrong. That is why the Supreme Court's recent decision in *Citizens United*, in which five conservative Justices rejected the Court's own precedent, the bipartisan law enacted by Congress, and 100 years of legal developments in order to open the door for massive corporate spending on elections, was such a jolt to the system.

Based on my review of Solicitor General Kagan's record, I expect that she and I will not always agree. I do not agree with every decision that Justice Stevens has written, but I have great respect for his judgment. I did not always agree with Justice O'Connor or with Justice Souter, but I never regretted my vote in favor of each of their confirmations. I respect their efforts to uphold the Constitution and the rule of law for all Americans. They looked to the express purpose and legislative intent of our laws, respected precedent, and considered the real-world consequences of their decisions.

The American people live in a real world of great challenges. The Supreme Court needs to function in that real world consistent with our Constitution. Vermont did not vote to join the Union until the year the Bill of Rights was ratified. Those of us from the Green Mountain State are protective of our fundamental liberties. Vermonters understand the importance the Constitution, and its amendments, have had in expanding individual liberties over the last 220 years.

I hope that Elena Kagan will demonstrate through this hearing that she will be the kind of independent Justice who will keep faith with these principles and with the words inscribed in Vermont marble over the front doors to the Supreme Court, "Equal Justice Under Law."

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