Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
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Opening Statement of U.S. Senator Sheldon Whitehouse
Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States
As Delivered

I welcome you, Solicitor General Kagan. You come before the Committee today with a remarkable record of achievement in the law. You have been a great student and scholar of the law, a skilled practitioner, and a dedicated public servant. I enjoyed meeting with you in my office and look forward to our discussions as the week proceeds.

I think it's fair to say that some of my Republican colleagues aren't so favorably disposed to your nomination. We've already heard a lot about their concerns. But let's not lose the big picture here. You are the Solicitor General of the United States - the lawyer for the United States before the Supreme Court - and the former Dean of Harvard Law School - a school to which I suspect every one of us on this Committee would be proud to have our children attend. Your nomination to the Supreme Court has to be among the least surprising ever made. And I don't want to take any suspense out of these proceedings, but things are looking good for your confirmation.

So, given this, I'd like to talk for a few minutes about the institution to which you've been nominated, our Supreme Court.

Alexander Hamilton explained, the "judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment." In other words, to fulfill its role in our constitutional system, the Supreme Court must act in a manner that demonstrates its adherence to the demands of the law, not merely an amenability to political preferences.

Important institutional traditions help the Court fulfill that duty. The Court can facilitate democratic processes, but to do so it must respect the other institutions of government. It can bolster the rule of law, but only by exercising proper judicial restraint and respecting precedent. It can uphold our Constitution, but it must not decide constitutional questions unnecessarily. The Court can exercise discretion wisely, but to do so it must balance competing constitutional values, not just apply a favored ideology. And the Court can bring true justice, but only if it approaches each case without predisposition or bias.

Unfortunately, the conservative wing of the current Supreme Court has departed from those great institutional traditions. Precedents, whether of old or recent vintage, have been discarded at a

startling rate. Statutes passed by Congress have been tossed aside with little hesitation. And constitutional questions of enormous import have been taken up hastily and needlessly.

From the five-man conservative wing, we have witnessed the discovery of an individual right to bear arms in the Heller decision - a right that previously had gone unnoticed by the Court for 220 years. And today, its extension to all our states and municipalities. We have seen the first prohibition on a woman's right to choose upheld with no exception to protect the health of the mother. This court even has chosen to inject itself into the day-to-day business of the lower courts - issuing an extraordinary ruling prohibiting the online streaming of the gay marriage trial in San Francisco. Each decision? 5-4.

Even more striking is the record of corporate interests before this Supreme Court. The Ledbetter case allowed an employer to get away with wage discrimination as long as it hid it successfully from the employee. The Gross case made it far harder for a victim of age discrimination to prove his or her case. The Iqbal case erected new pleading hurdles protecting defendents - likely corporations - from injured plaintiffs. Only last week, the Rent-A-Center decision concluded that an employee who challenges as unconscionable an arbitration demand must have that challenge decided by the arbitrator. And the Citizens United decision - yet another 5-4 decision - created a constitutional right for corporations to spend unlimited money in American elections, opening our democratic system to a massive new threat of corruption and corporate control. There is an unmistakable pattern. For all the talk of "umpires" and "balls and strikes" at the Supreme Court, the strike zone for corporations gets better every day.

The tide of decisions running against the accountability of big corporations degrades a core constitutional principle. The Founding Fathers provided, as an essential element of our balanced American system of government, the institution of the jury. The Founders put the jury three times into the Constitution and the Bill of Rights. It is there for a reason, as the founding fathers knew - they were tough, smart politicians. When the forces of society are arrayed against you, when lobbyists have the legislature tied in knots, when the governor's mansion is in the pockets of special interests, when the owners of the local paper have marshaled popular opinion against you, one last sanctuary still remains: the jury. Against that tide of corporate influence and wealth stands the jury box - its hard square corners resolute. That was why DeTocqueville called the jury an "institution of government" and "a mode of the sovereignty of the people." Not for nothing was the chapter in which he discusses the jury entitled: "On What Tempers the Tyranny of the Majority."

Now, powerful corporations don't like the jury. They don't like the fact that they too must stand before a group of ordinary citizens, without the advantage of all the influence that money can buy. They would love a world in which their every contact with government was lubricated by corporate money. But to tamper with a jury is a crime. So they've long been on a campaign to smear the jury - the "runaway jury" as their P.R. folks have coached them to call it.

Sadly, the Supreme Court seems to be buying what corporations are selling. The Exxon v. Baker decision, which arose from the terrible Exxon Valdez spill, rejected a jury's award of $5 billion in punitive damages - just one year's profits for Exxon - and reduced the award by 90%. Anything more than the compensatory damage award, the Court reasoned, would make punitive damages too unpredictable for corporations. The judgment of the jury, and the wisdom of the Founding

Fathers, were for the Court lesser values than providing corporations "predictability." Well what of the unpredictability for Alaska of Exxon's drunken captain running his ship aground? And one can't help but wonder now what additional precautions BP might have taken in the Gulf if that corporation didn't know that the Supreme Court had its back on "predictability".

I mention these concerns to you, Solicitor General Kagan, because, if confirmed, you will make decisions that affect every aspect of Americans' lives. If confirmed, I hope and trust that you will adhere to the best institutional traditions of the Supreme Court and act with a clear understanding of the proper role of all the institutions of government provided for us by our Founding Fathers. It is a great Constitution we have inherited. And you will be a great Justice if you interpret our Constitution in the light of its founding purpose, rather than according to the preferences of today's most powerful interests.

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