

Statement of  
**The Honorable Patrick Leahy**

United States Senator  
Vermont  
July 20, 2010

Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
On The Nomination Of Solicitor General Elena Kagan  
To Be An Associate Justice Of The Supreme Court Of The United States  
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Today, the Committee will finally vote on the nomination of Elena Kagan to be an Associate Justice of the United States Supreme Court. I outlined my standards for considering this nomination and announced my support last week.

I briefly note that the Republican criticism that Solicitor General Kagan lacks judicial experience fails to acknowledge that it was Senate Republicans who refused to proceed with her nomination to the D.C. Circuit Court of Appeals when she was nominated by President Clinton in 1999. She was one of the more than 60 judicial nominees pocket filibustered in those years by Senate Republicans. Had she been considered and confirmed then, as I expect she would have been, she would have served as a circuit court judge for the last 11 years. Instead, she became an outstanding law professor, the first woman Dean of Harvard Law School, and the first woman to serve as the Solicitor General of the United States. She has received the highest possible rating from the American Bar Association's Standing Committee on the Federal Judiciary. Her credentials and legal abilities have been extolled by many, including those across the political spectrum, from Justice O'Connor and Justice Scalia to Michael McConnell, Kenneth Starr and Miguel Estrada. Like William Rehnquist, Robert Jackson, Hugo Black, Felix Frankfurter and even the great John Marshall, Solicitor General Kagan's work outside the judicial monastery do not disqualify her from serving effectively as a Justice.

I spoke about the qualities that have led me to support Solicitor General Kagan's nomination last week. Throughout this process culminating in our hearing three weeks ago, I looked to see whether Solicitor General Kagan would fairly apply the law and use common sense. I looked to see whether as a Justice she would appreciate the proper role of the courts in our democracy. I tried to determine whether she understands why the law matters. Would she be the kind of independent Justice who would keep faith with each of the words inscribed in Vermont marble over the front doors to the Supreme Court -- "Equal Justice Under Law?" Those are the standards I have applied to every Supreme Court nomination, including the six Justices nominated by Republican Presidents that I have supported.

Solicitor General Kagan demonstrated an impressive knowledge of the law and fidelity to it. She spoke of judicial restraint, her respect for our democratic institutions, and her commitment to the

Constitution and the rule of law. She made clear that she will base her approach to deciding cases on the law and the Constitution, not politics or an ideological agenda.

I was struck that after the Wall Street Journal editorialized against her last Tuesday morning and demanded that she pledge to recuse herself from cases in which she was not involved as the Solicitor General of the United States, several Republican members of this Committee took up that matter. I thought her pledge to approach every case in accordance with law was the right one.

I note that on the issue of recusal, we included a recusal question in our Committee questionnaire at the outset of this process in May and she responded. I asked her about recusal in my opening round of questions and she responded. When Senator Coburn asked her whether she had advised on the health care reform bill, she responded that she had not. Having not asked about recusal during the hearing, Senator Sessions quoted her testimony that she would recuse herself in any case in which she played any kind of substantial role, and proceeded in his subsequent, written questions two weeks ago to ask an eight-part question about recusal. She answered two weeks ago.

Until the Wall Street Journal editorial last Tuesday morning, the issue of recusal did not appear to rank highly as a matter on which the Republican members of this Committee seemed concerned. It was only after publication of the editorial that Republican members decided they had not yet asked "essential" questions of the nominee. It was only then that we heard criticism of the nominee for not agreeing to recuse herself in cases in which that is not required by the canon of judicial ethics. It was only then, after the Wall Street Journal editorial was published, that on Tuesday afternoon the Republican members of the Committee sent her a letter with yet another set of questions arguing that she should recuse herself in all manner of cases, even if she had not been involved in them as Solicitor General and the canons of ethics do not require it. She has responded to that letter, as well, making clear yet again her strong commitment to follow federal recusal standards. Her response to the letter also stated in plain language that she had no substantive involvement in health care reform or the underlying legal and constitutional issues. Senators are free to credit her answers or not, but I hope they will not continue to argue without basis that she has misled the Committee.

I spoke to the Senate more than a month ago about Elena Kagan's actions as Dean in seeking to honor Harvard Law School's longstanding policy against discriminatory hiring and accommodate for military recruiting. No document, question or testimony has undermined the facts or challenged my statement. Elena Kagan respects and admires our military men and women. We have now received letters and testimony from Harvard Law veterans with direct knowledge about her support for them.

I do not contend that those who have recently filibustered veterans' benefits and have threatened to filibuster legislation authorizing our Department of Defense programs and activities are antimilitary. They should not contend that she is. Moreover, her actions demonstrated respect for the law and our legal system by seeking to work within it.

Finally, I want to thank Senators Durbin and Cardin for their remarks in defense of Justice Thurgood Marshall at our hearing. I was deeply disappointed that this giant of American law,

whose life was devoted to securing the liberty of all Americans, was the subject of disparagement during those proceedings. In her contribution to the 1993 tribute to Justice Marshall by the Texas Law Review, Elena Kagan recalled how Justice Marshall's law clerks had tried to get him to rely on notions of fairness rather than the strict reading of the law to allow an appeal to proceed on a discrimination claim. She wrote that the 80-year-old Justice referred to his years trying civil rights cases and said that all you could hope for was that a court would not rule against you for illegitimate reasons, but that you could not expect that a court would bend the rules in your favor. Just as Sir Thomas More reminded his son-in-law in that famous passage from "A Man for All Seasons," that the law is our protection, Justice Marshall reminded his clerks that the existence of rules and the rule of law is the best protection for all, including the least powerful. Elena Kagan concluded, as I do, that Justice Marshall "believed devoutly . . . in the rule of law." He was a man of the law in the highest sense. He understood the Constitution's promise of equality to his core.

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Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
On The Nomination Of James Cole To Be Deputy Attorney General  
July 20, 2010

The Deputy Attorney General is the number two position at the Justice Department. It is vital to our national security and Federal law enforcement that this position be filled promptly, and I hope we can do so without further unnecessary delay.

I had hoped that we could have sent the Deputy Attorney General to the Senate before now. In requesting another week holdover after the recess week, Republican members said that they had not reviewed the reports from Mr. Cole's work as a court-appointed monitor for AIG that I had assisted them in obtaining the week before. I trust we can now proceed with consideration of this important nomination and that he will be approved in the same spirit that we approved the nominations of Larry Thompson, James Comey, Paul McNulty and Mark Filip to serve as the Deputy Attorney General during the last administration.

Jim Cole served as a career prosecutor at the Justice Department for a dozen years and has a well-deserved reputation for fairness, integrity and toughness. As he clearly demonstrated during his confirmation hearing five weeks ago, he understands the issues of crime and national security that are at the center of the Deputy Attorney General's job.

This nomination has received strong endorsements from Republican and Democratic public officials and from high-ranking veterans of the Justice Department, including former Senator Jack Danforth who worked with him for more than 15 years and described him as someone without an ideological or political agenda.

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