

Statement of
The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
July 20, 2010

Remarks of Sheldon Whitehouse;
Senate Judiciary Committee Meeting on the Nomination of Solicitor General Elena Kagan
to be an Associate Justice of the Supreme Court
As Delivered

Thank you, Chairman Leahy. Thank you particularly for your leadership of this Committee through this confirmation process. I am proud to vote in support of Solicitor General Elena Kagan's confirmation to the United States Supreme Court. I'm also honored to be here on this day, when after nearly 30 years on this Committee, our colleague, Senator Specter, spoke for the last time on a Supreme Court nominee.

Elena Kagan is a remarkably qualified attorney and public servant. She is the lawyer for the United States, representing our nation's interests before the Supreme Court and managing its appellate litigation across the country. She is the former Dean of Harvard Law School. And, as America saw during her hearing, she is a thoughtful lawyer who always seeks to understand and reconcile. She will bring strong judgment, incisive analysis, and a commitment to consensus-building to the Supreme Court.

Solicitor General Kagan also understands the proper role of a judge. As she stated, law is not a "robotic enterprise." It is foolish to think, as she explained "that there's a kind of automatic quality to [law]," and false to pretend that a judge simply calls "ball[s] and strike[s], and everything is clear-cut, and that there is . . . no judgment in the process." The Supreme Court does not get the easy decisions, and the simplistic "umpire" metaphor does not explain how to resolve tension between competing constitutional values or apply constitutional rules to new - and to the Founders, unimaginable - factual situations. Judging is complicated. Supreme Court judging, even more complicated. If it were simple, every decision would be 9-0.

Some of our colleagues would have us believe that it should be that easy. The right answer, it appears, is that they think it is and any other conclusion is liberal judicial activism. But if you're really looking for evidence of activism, look at the objective facts: if you were an activist court, you would make a lot of 5-4 decisions. Why narrow your decision in search of a larger consensus, if your purpose is the decision and not the consensus? And the Roberts Court is notorious for 5-4 decisions; if you were an activist court, to achieve your purposes you'd run over restrictions like the limits Senator Specter referred to on appellate fact-finding - and the Roberts Court ran over just that restriction against fact-finding to support its 5-4 Citizens United decision; if you were an activist court you'd want to advance a theory to selectively undermine precedent you didn't like - and Chief Justice Roberts advanced just such a theory in his Citizens United

concurrence; if you were an activist court you'd give Congress no deference, a recurring feature of Roberts Courts decisions; and most of all if you were an activist court, a pattern would emerge to your decisions as you moved the Court in the desired direction - and on the Roberts Court, one pattern is striking. The clear pattern of corporate victories at the Roberts Court reaches across many fields - arbitration, anti-trust, employment discrimination, campaign finance, or legal pleading, to name a few. The current Supreme Court has over and over rewritten our law, consistently in big corporations' favor, consistently throwing obstacles up to Americans' right to a jury - the one institution of government where corporate money carries no influence.

I thank you again, Mr. Chairman, for you and the way the ranking member have conducted these proceedings. It is an honor to vote for Solicitor General's confirmation. I look forward to following her career on the Court, and I hope she helps return the Court to the center, to modesty, and to the true collegiality of super-majority opinions.

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