

Testimony of
Elena Kagan

February 10, 2009

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Opening Statement
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Thank you, Mr. Chairman. And thank you, Senator Reed, for that kind introduction. It has been a pleasure and privilege getting to know you these last few years.

Mr. Chairman and Members of the Committee, I am deeply honored to be sitting here today. And I am grateful. I am grateful to the President for nominating me, to the Attorney General for supporting me, and to the Committee for holding this hearing and considering my nomination. I am particularly grateful to the many members of the Committee, from both sides of the aisle, who met and talked with me before this hearing.

I would like to say a few words about some people who are here with me today and some people who could not be. I have two terrific brothers who are high school teachers in New York City. I know how hard they work, and I excused them from coming down today. They both teach social studies, and I suspect the transcript or tape of this hearing will somehow become part of a lesson plan. Doubtless I'll be graded on my performance.

My older brother's daughter, my niece Rachel, is here today. She is graduating from college this year and looking forward to law school. I think she will be a simply splendid lawyer. And many of my friends from Harvard Law School - the place that has been my home, in every sense of the word, for the last ten years - are here with me as well. Law professors, you'll understand, don't work quite as hard as high school teachers, so I gave them permission to come down. I'm pleased to introduce: Charles Fried, himself a former Solicitor General, Jack Goldsmith, John Manning, Dan Meltzer, Martha Minow, and Carol Steiker. They are my best friends at Harvard, but doubtless they will be grading me too.

I wish my parents could have lived to see this day. My father was a lawyer himself and took great pride in my professional accomplishments. He died about 15 years ago now, but he lived to see me clerk for the Supreme Court and become a professor at the University of Chicago, and he thought that was pretty great. My mother died just last summer, so her absence here is especially difficult for me. She grew up in a time when few women pursued high-powered professional careers; and maybe for that reason, she relished my doing so. She would have loved this day. Both my parents wanted me to succeed in my chosen profession. But more than that, both drilled into me the importance of service, character, and integrity. I pray every day that I live up to those standards.

I hope one other person is looking down on this hearing room today. As you know, I had the privilege of clerking for Justice Thurgood Marshall - the greatest lawyer, I think, of the 20th

century. Justice Marshall had some awfully good jobs in his life. But he always said that the best, bar none, was being Solicitor General. I'm sure there were many reasons for that, but I've been thinking recently about one in particular. I think he must have been so deeply moved to walk into the most important court in this country when it was deciding its most important cases and to say, "I represent the United States of America." And I think he would have liked that a former clerk of his would be nominated for the same job and, if confirmed, would be able to say those same most thrilling and most humbling words for a lawyer.

To have the opportunity to lead the Solicitor General's Office is, indeed, the honor of a lifetime. As you know, this is an office with a long and rich tradition not only of extraordinary legal skill but of extraordinary professionalism and integrity. That is due in part to the people who have led it, and I especially want to acknowledge Generals Olsen, Clement, and Garre for their superb service during these last eight years. In a time of some difficulty for the Justice Department, they have maintained the highest standards of the office, and they have served their client, this nation, very well. They have been joined in this regard by the career lawyers and other public servants in the Solicitor General's office. Those men and women have been justly called the finest law firm in this country, and they represent the gold standard in federal public service.

The Solicitor General's Office is unusual in our government in owing responsibilities to all three of the coordinate branches in our system of separated powers. Because of this striking feature of the office, the Solicitor General traditionally has been accorded a large measure of independence.

Most obviously, of course, the Solicitor General reports to the Attorney General and, through him, to the President, and defends the regulations, policies, and practices of the executive branch when these are challenged. In this role, the Solicitor General is the principal advocate of the executive branch in the courts of the United States.

At the same time, the Solicitor General has critical responsibilities to Congress - most notably, the vigorous defense of the statutes of this country against constitutional attack. Traditionally, the Solicitor General has defended any federal statute in whose support any reasonable argument can be made, outside of a very narrow band of cases involving the separation of powers. I pledge to continue this strong presumption that the Solicitor General's office will defend each and every statute enacted by this body.

Finally, the Solicitor General's office has unique obligations to the Supreme Court of the United States. It is frequently said that the Solicitor General serves as the 10th Justice - though I suspect the Justices think of her more as the 37th clerk. Regardless, the Solicitor General must honor the principle of stare decisis, exercise care in invoking the Court's jurisdiction, and most important of all, be scrupulously candid in every representation made to the Court. In this sense, the most important of all the Solicitor General's responsibilities is to be true to the rule of law.

Mr. Chairman and Senators, it would be an honor to serve as Solicitor General, and I commit that if the Senate sees fit to confirm me, I will do everything possible to live up to the great traditions, expectations, and responsibilities of the Solicitor General's Office.

Thank you.