

Statement of
The Honorable Russ Feingold

United States Senator
Wisconsin
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Senator Russell D. Feingold
Senate Judiciary Committee Statement on the Nomination of Elena Kagan
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Thank you Mr. Chairman. I want to speak briefly about the nomination of Elena Kagan to be an Associate Justice of the United States Supreme Court.

First, I want to compliment you and your staff on your efforts to make this confirmation process so thorough and transparent. The committee has had the opportunity to review nearly 200,000 pages of internal memos and emails from Ms. Kagan's service as a law clerk to Justice Thurgood Marshall and as a White House aide during the Clinton Administration - making the examination of her record one of the most thorough and searching in history. I appreciate that President Obama and President Clinton did not raise claims of executive privilege to try to stop the release of documents, which was a refreshing change and a practice that I hope future Presidents will follow in years to come.

All but a tiny fraction of these documents have been made available online, granting extraordinary access to the public. I said after last year's hearings for Justice Sotomayor that you had set a new standard for transparency and public access to Supreme Court nomination hearings, and here you have done it again. I truly commend you for that, and thank you and your staff for your tremendous work over the last two months.

Mr. Chairman, there is no question that Elena Kagan is eminently qualified for a position on the Supreme Court. She has an impressive education, she has worked at the highest levels of government, and she has served as dean of a top law school. During the hearings, she demonstrated a keen mind, thoughtful analysis, and a wide-ranging command of the law. She has developed a reputation as someone who can reach out to those with whom she may not agree and work together, and that skill should prove very valuable on the Court. I believe that because she has not previously been a judge, she will bring a different and important perspective to a Court that is otherwise entirely populated by former appellate judges.

I appreciated the nominee's efforts to improve the confirmation process by being forthcoming in her answers. Fifteen years ago she quite fairly criticized the process in an article, arguing that the American people deserved more substantive discussions of the law. While I can't say that she quite lived up to the high standard that she set for nominees in 1995, I do believe that she tried to

answer our questions as openly and comprehensively as she could, given what the confirmation process has become.

I came away from the confirmation process convinced that Elena Kagan understands the appropriate relationship between the courts and Congress. As she explained at the hearing, her work with Congress during her time at the White House taught her a healthy respect for the political branches and how difficult it can be for Congress to pass legislation. I hope that Ms. Kagan will keep this in mind before she votes to overturn a bill that Congress may have spent years drafting and debating.

But while this deference is important, Ms. Kagan also demonstrated that she recognizes the critically important role of our judicial system in serving as a check on the other branches of government - in "policing constitutional boundaries," as she put it. She spoke eloquently about the early experiences of Justice Marshall and his efforts to eradicate Jim Crow laws and racial segregation. She explained that what was so incredible about his struggle for equality was that "the courts [took] seriously claims that were not taken seriously anywhere else. ... In other words, it was the courts' role to make sure that even when people have no place else to go that they can come to the courts and the courts will hear their claims fairly." She said this was a miraculous thing about courts, and I agree with her. With regard to executive power, she emphasized that "no person, however grand, however powerful, is above the law." She also talked about "the importance of adhering to the law, no matter the temptations, no matter the pressures that one might be subject to in the course of one's career." These insights indicate that she will take seriously the Court's role in safeguarding individual rights and protecting the rule of law.

In addition to informing the committee about the nominee, these hearings also taught us more about the Supreme Court. We have heard a lot in recent years about "judicial activism." But I think these hearings helped underscore that activism is in the eye of the beholder. As Justice Souter explained in a recent speech, the truth is that the Supreme Court has to decide hard cases - cases in which a judge cannot simply read the words of the Constitution and objectively evaluate the facts. That is, a judge cannot simply act as an umpire. Judges often have to choose between positive values in the Constitution that are in tension with each other, he noted.

Justice Souter reminded us that facts may look very different in different historical contexts. The quintessential example of this is the Court's historic decision in *Brown v. Board of Education* to overturn *Plessy v. Ferguson* - a case that by current standards would surely qualify as judicial activism but that is one of the most revered in our nation's history. What this shows us is that judging is not a "robotic enterprise," as Solicitor General Kagan told Senator Klobuchar. Judging is hard and it does, in fact, require judgment. But, Justice Souter explained, "we can still address the constitutional uncertainties the way [the Framers] must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people." I believe Elena Kagan will fulfill that vision admirably.

So I will vote to confirm Elena Kagan to be an Associate Justice of the United States Supreme Court. I look forward to her confirmation as only the fourth woman in history to serve on our nation's highest court, and I expect she will serve with distinction - and with good humor, which she demonstrated throughout this arduous process - for many years to come.

Thank you Mr. Chairman.