

STATEMENT OF GREGORY G. GARRE

Partner, Latham & Watkins LLP

**Former Solicitor General of the United States,
United States Department of Justice**

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Hearing Titled:

**“The Nomination of Elena Kagan to be an Associate Justice
of the Supreme Court of the United States”**

PRESENTED ON JULY 1, 2010

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Chairman Leahy, Ranking Member Sessions, and Members of the Committee on the Judiciary, it is an honor to appear before you today and testify in support of the nomination of Solicitor General Elena Kagan to be Associate Justice of the Supreme Court of the United States. The Committee considers few matters as important as the nomination of an individual to serve on the Supreme Court of the United States and it is a privilege to participate in the Committee’s consideration of the nomination of General Kagan to serve on the Court.

By way of introduction, I am a partner in the Washington, D.C. office of Latham & Watkins LLP and global chair of the firm’s Supreme Court and Appellate Practice Group. In 2008-2009, I had the great privilege of serving as the 44th Solicitor General of the United States, preceding General Kagan in that position. I previously served as Acting Solicitor General (2008), Principal Deputy Solicitor General (2005-2008), and Assistant to the Solicitor General (2000-2004), and am the only person to have served at all three levels of the Solicitor General’s office – as an Assistant, Deputy, and Solicitor General. I have served in the Department of Justice under both Democratic and Republican Administrations and as a career lawyer as well as a political appointee. And I have been very fortunate to serve under three of the nation’s finest Solicitors General: Paul D. Clement, Theodore B. Olson, and Seth P. Waxman. Between my periods of government service, I have represented corporations, individuals, and other entities before the Supreme Court and appellate courts as a lawyer in private practice. Over the past decade, I have argued 29 cases before the Supreme Court, including two cases during the past

term. In 1992-1993, I served as a law clerk to former Chief Justice William H. Rehnquist. I have written and spoken frequently about the Supreme Court and have served for nearly ten years at various times as a visiting professor of law and an adjunct professor of law at the George Washington University Law School, focusing on Supreme Court practice and constitutional law.

In my testimony today, I will explain why General Kagan's experience as Solicitor General will serve her well on the Supreme Court, and why prior judicial experience is not a necessary prerequisite to service on the Supreme Court. While my testimony is focused on these particular aspects of General Kagan's background, I also appear before you in support of General Kagan's nomination to be Associate Justice of the Supreme Court. Indeed, I was pleased to sign a joint letter recently sent to this Committee by ten former Solicitors General from different Administrations going back for nearly a quarter of a century supporting General Kagan's nomination, which I have attached hereto. I believe that General Kagan has the background and experience to serve with distinction on the Supreme Court, as have prior Solicitors General and alumni of the Office of the Solicitor, including Justice Robert H. Jackson (Solicitor General, 1938-1940), Justice Thurgood Marshall (Solicitor General, 1965-1967), and, more recently, Chief Justice John G. Roberts, Jr. (Principal Deputy Solicitor General, 1989-1993), and Justice Samuel A. Alito (Assistant to the Solicitor General, 1981-1985).

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When she was nominated to be Solicitor General of the United States in January 2009 by President Obama, General Kagan had already accumulated a wealth of experience and distinction in the law and academia. She had clerked on the Supreme Court for the nation's 33d – and first African American – Solicitor General, Thurgood Marshall. She had worked for a top tier private law firm in Washington, D.C. She had served as an associate counsel and policy

advisor to President Clinton. She had served as a law professor at two of the nation's leading law schools. And she had served as Dean of the Harvard Law School.

Elena Kagan was confirmed by the Senate as the nation's 45th Solicitor General of the United States in March 2010. I first met her in January 2010 at the close of the Administration of George W. Bush while I was serving as the 44th Solicitor General, shortly after she was nominated to serve as Solicitor General in the incoming Administration of Barack Obama. Our first meeting focused on the work of the Office of the Solicitor General and the job of the Solicitor General as she began her preparations to assume that important post. I have had several subsequent discussions with her concerning the Office of the Solicitor General and have always been impressed by her obvious intellect, charm, and fair-mindedness. It was evident from the outset that General Kagan had a great respect for the Office of the Solicitor General and its lawyers and staff, and was focused on doing everything she could to hit the ground running once she was confirmed by the Senate. Looking back, it is clear that she succeeded in that task. While the Committee of course will consider all aspects of her background and work, her tenure as Solicitor General will be an enormous asset to her as an Associate Justice.

The Office And Responsibilities Of The Solicitor General

To understand why, let me first briefly outline the job of the Solicitor General, which – at least to anyone who has been privileged to hold the post – is surely one of the unique and most treasured legal positions in American government. The Solicitor General is an Executive Officer who reports to the President and Attorney General. She is the only Executive Officer required by statute to be “learned in law.” The Solicitor General oversees a relatively small office of about 20 attorneys – including the Principal Deputy Solicitor General, three Deputy Solicitors General, and 15 Assistants to the Solicitor General – and an extremely qualified support staff.

There are only two political positions in the Office – Solicitor General and Principal Deputy Solicitor General. The remaining positions are all “career” slots, held by attorneys who generally stay from one Administration to the next. There is no finer or more dedicated group of lawyers, and – no matter who the Solicitor General is – the Office of the Solicitor General simply could not function without them. By tradition, and for good reason, the Solicitor General exercises a significant degree of independence within the Department of Justice, and even within the Executive Branch, though the Solicitor General is of course ultimately accountable to the President and Attorney General like other officers.

The Office of the Solicitor General was established in 1870 and charged with the same principal duties that the Solicitor General carries out today. There are two overriding responsibilities. The first, and most well known, is to supervise and conduct the litigation in the Supreme Court on behalf of the federal government and its officers. The United States is involved in about two-thirds of all the cases the Supreme Court decides on the merits each year. The Solicitor General – and the small cadre of lawyers in her Office – is responsible for briefing and arguing all of those cases. But that is only a part of the work that the Solicitor General does before the Supreme Court. She also is responsible for determining when to petition for certiorari review to the Supreme Court and for opposing certiorari in the thousands of cases each year in which individuals, primarily those in the criminal justice system, challenge lower court rulings in cases in which the United States is a party, as well as many other non-merits filings.

The Solicitor General and the lawyers in her Office appear before the Supreme Court as advocates for their client, but it is also a deeply ingrained in the ethos and mission of the Office that these lawyers have a duty to serve Justice and the best interests of the United States as well. Former Solicitor General Simon Sobeloff put it this way: “The Solicitor General is not a neutral,

he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish Justice." Each amicus brief that the Solicitor General files in the Supreme Court begins with a statement of "Interest of the United States" explaining the government's interests in the case. Likewise, in considering whether the United States's participation in a case is warranted, or what position the United States should take, the lawyers in the Office from the Solicitor General to the Assistants consider the best interests of the United States – with an eye toward the long term and in view of prior positions that the United States has taken before the Court. Because the Solicitor General's duty is to represent the interests of her client and the United States more generally, the positions taken by the Solicitor General do not necessarily reflect her personal views.

The Office's reputation for excellence is inextricably tied to the Solicitor General's work before the Supreme Court. As one of the nation's greatest Solicitors General, Rex Lee, once observed: "There is a widely held, and I believe substantially accurate, impression that the SG's office provides the Court from one Administration to the next – and largely without regard to either political party or the personality of the particular Solicitor General – with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers." The Solicitor General's credibility – and thus currency – before the Court depends on ensuring that the lawyers in the Office at any given time live up to that standard of excellence.

The other primary responsibility of the Solicitor General is generally to oversee litigation conducted by the federal government and its officers in the federal appellate courts. In particular, the Solicitor General is responsible – with assistance from the litigating divisions within the Department of Justice and affected agencies – for reviewing cases decided adversely

to the federal government in the district courts to determine whether they should be appealed and, if so, what position should be taken. In addition, the Solicitor General is responsible for determining whether the government will participate as an *amicus curiae*, or intervene, in cases in any appellate court, when the federal government is not currently a party to the case. The Solicitor General makes literally thousands of decisions each year on such matters, which typically reach the Solicitor General in often voluminous packets of materials called “appeal recommendations.” While these decisions are typically not as high-profile as the Supreme Court cases handled by the Office, they are an important part of the Solicitor General’s job and duty to protect the interests of the United States in the federal court system and help to ensure that the United States speaks and acts with one voice throughout the appellate courts across the country.

General Kagan’s Service As Solicitor General Is An Enormous Asset

It goes without out saying that service as a Solicitor General is not a prerequisite to service on the Supreme Court, and that service as a Solicitor General does not alone qualify an individual to serve on the Court. Nevertheless, many Solicitors General and alumni of the Office of the Solicitor General have gone on to serve with distinction on the Supreme Court, including Justice Robert H. Jackson (Solicitor General, 1938-1940), Justice Thurgood Marshall (Solicitor General, 1965-1967), and, more recently, Chief Justice John G. Roberts, Jr. (Principal Deputy Solicitor General, 1989-1993), and Justice Samuel A. Alito (Assistant to the Solicitor General, 1981-1985). (A list of the Justices who have served as Solicitor General, or in another capacity in the Office of the Solicitor General, is included in the addendum hereto.) And in a number of different respects, the job of Solicitor General, and service in the Office of Solicitor General more generally, provides an invaluable learning experience and training ground for any individual who is given the enormous privilege and responsibility of serving on the Court.

To begin with, the Solicitor General has a special relationship with all three branches of government, giving her a unique perspective on our system of government. The Solicitor General is foremost an Executive Officer who is the President's chief advocate before the Supreme Court. But the Solicitor General has a special relationship with Congress as well, because by tradition and statute the Solicitor General is generally obligated to defend the constitutionality of federal statutes whenever she determines that a reasonable, good faith defense may be made. In discharging that important duty, it is not uncommon for the Solicitor General vigorously to defend the constitutionality of a statute that may not be politically in favor of the current Administration. And the Solicitor General of course has a special relationship with the Supreme Court, as an Officer of the Court and the most frequent litigant before the Court. The Solicitor General's relationship with all three branches of government gives the Solicitor General an opportunity to see the legal problems facing our government from different vantage points, which would serve a Justice well in analyzing those problems on the Bench.

The Solicitor General's special relationship with the Court is particularly important in considering the value of this experience when it comes to service on the Court. The Solicitor General has been referred to as the "Tenth Justice," though – as many Solicitors General have remarked – never by the Justices themselves. The Solicitor General is the most frequent litigant before the Court and has an office in the Supreme Court building itself – making the Solicitor General only one of two government officials with offices in another branch of government, the other being the Vice President (who of course has an office in the Senate, in his capacity as President of the Senate). The Supreme Court relies on the Solicitor General and the lawyers in her office for a forthright and fair presentation of the cases in which the government is involved as a party or amicus. And the Solicitor General is the only person whose "views" the Court

regularly seeks out, as the Court does on a dozen or so occasions each term in deciding whether to grant certiorari in cases (by issuing an order calling for the views of the Solicitor General). The Solicitor General's schedule virtually revolves around the Court's, and a Solicitor General spends a great deal of time in Court both watching the Court in action and interacting with the Court at oral argument. One cannot hold the position of Solicitor General without a profound respect for and appreciation of the Supreme Court and its role in American government.

Service as Solicitor General provides a unique look at the workload and rhythms of the Court as well as the idiosyncrasies of the business of the Court, including its certiorari process for determining which cases to hear on the merits and more arcane facets of the Court's docket such as original actions. The Solicitor General ordinarily is involved in about two-thirds of the merits cases pending before the Court in any given term and an enormous number of cases pending before the Court at the certiorari stage. For example, in recent terms, the Solicitor General has filed from 11 to 31 petitions for certiorari or jurisdictional statements, filed from 485 to 911 responses to petitions for certiorari, filed from 14 to 23 amicus invitation briefs, participated as an amicus curiae (in briefing and oral argument) in 16 to 23 cases, and filed merits briefs and presented oral argument in 59 to 63 cases – annually. The subject areas in which the Solicitor General has filed briefs runs the gamut of the Court's docket ranging from administrative law to antitrust law to civil rights to constitutional law to criminal law to environmental law to tax to any number of other subjects. As part of her day-to-day job, the Solicitor General – in reviewing and revising briefs, preparing for oral argument, and reviewing recommendations from other agencies or offices within the Department of Justice for action before the Court – must grapple with the same range of issues facing the Court. That experience no doubt will be invaluable in undertaking the difficult work load of the Court first hand.

One of the most visible – and nerve wracking – duties of the Solicitor General is to argue cases before the Supreme Court. The Solicitor General customarily assumes the responsibility for arguing the most important and invariably most difficult cases in which the government is involved before the Court – and General Kagan did just that. In the past term, she presented oral argument in several of the most contentious and complex cases before the Court, including *Citizens United v. FEC*, *Salazar v. Buono*, *Free Enterprise Fund v. Public Company Accounting Oversight Accounting Board*, *United States v. Comstock*, and *Holder v. Humanitarian Law Project*, and she ultimately prevailed on behalf of the government in most of those cases. General Kagan has learned first hand the rigors of oral argument before the current Court – surely the most active and intellectually rigorous Court from the Bench in the nation’s history when it comes to oral argument – and immediately proved herself up to the challenge. Her numerous appearances as an oral advocate before the Court no doubt will prove beneficial in approaching oral argument from the other side of the Bench as well.

A Solicitor General also gains a deep appreciation for the general presumption of the constitutionality of Acts of Congress and the importance of consistency in the law over time – two of the hallmarks of the rule of law in our system of government. As discussed, one of the most important responsibilities of the Solicitor General is generally to defend the constitutionality of statutes challenged before the Court. That duty is a part of the ethos of the Office and ingrained in all of its lawyers. So too is the importance of ensuring the consistency of the legal positions that the Solicitor General takes before the Court. The currency of the Solicitor General before the Court is in many respects tied to the credibility of the positions that the Solicitor General takes before the Court. And if those positions changed from one Administration to the next, the credibility of the Solicitor General would be severely damaged.

The importance of maintaining the consistency of the legal positions that the Solicitor General takes before the Court is thus in a general sense analogous to the importance of maintaining the consistency of the Supreme Court's own precedents under the doctrine of *stare decisis*.

In this respect, in particular, General Kagan has distinguished herself and honored the finest traditions of the Office. Being Solicitor General at the time of a change of Administrations is particularly challenging because of the natural tendency of those in political positions to expect a change – at least at the margins – in positions that the prior Administration has taken before the Court. Former Solicitor General Seth Waxman, the outgoing Solicitor General at the end of the Clinton Administration, once remarked: “In the past year, many people have asked me, ‘Is Ted Olson going to adhere to the position that you took before the Supreme Court in the *X* or *Y* case?’ My response always is, ‘I can’t speak for the solicitor general, but the positions that we took were positions that represented the views of the United States.’” General Kagan has managed the invariably challenging transition from one Administration to the next with the best interests of the Office of Solicitor General and the United States in mind – as opposed to any political objective – and stepped into and just as forcefully defended the interests of the United States in cases that I authorized and filed as Solicitor General at the end of the Bush Administration (such as, to take only one example, *Salazar v. Buono*, which she successfully argued in October 2009) as the cases that she authorized and filed as Solicitor General. The Office of the Solicitor General, and the nation, have benefitted greatly from that approach.

One of the important responsibilities of the Solicitor General is to make decisions on the numerous “recommendations” that reach the Solicitor General’s desk each day – in batches. These recommendations, such as on whether to appeal a case that the government lost in the district court, often are unanimous and relatively routine. But they may also be extremely

complex and contentious, and involve situations where different executive agencies or divisions within the Department of Justice – with different and equally legitimate interests in mind – disagree strongly over what action or position the United States should take and what is in the long term interests of the United States. The Solicitor General – with the wise counsel of the lawyers in her office – must resolve these disputes, usually after meeting with and hearing from the interested agencies and components of government and receiving written recommendations from multiple outside entities and lawyers within the Solicitor General’s office. This process gives the Solicitor General a special appreciation for the many challenges that our government faces and the fact that different entities – typically with equally legitimate interests and views, but different institutional perspectives – may disagree strongly about the proper course in a matter. While this process is certainly distinguishable from the Article III judicial process, I believe General Kagan’s experience in approaching and resolving these intra-Executive branch disputes will help her in the enormously challenging task of analyzing and deciding the nation’s most difficult legal problems – *i.e.*, the matters that routinely reach the Supreme Court.

Since the September 11 attacks, the Solicitor General has taken on an additional – and vitally important – responsibility in overseeing litigation arising out of and involving the war on terror. There are scores of cases pending in federal court today involving enemy combatants captured in connection with the ongoing hostilities in Iraq and Afghanistan, and numerous other cases involving other aspects of the government’s response to the grave threat posed by al Qaeda and other terrorist organizations, including challenges to the government’s foreign electronic surveillance programs. This far-ranging litigation has raised novel, challenging, and enormously important legal and constitutional issues, many of which have reached the Supreme Court on an almost annual basis since September 11, 2001. And one of the most important responsibilities of

the Solicitor General today is to manage and oversee this litigation at least when it reaches the appellate level. General Kagan has fully embraced that critical responsibility.

For example, she successfully argued *Holder v. Humanitarian Law Project*, involving a First Amendment challenge to the “material support” statute (18 U. S. C. §2339B(a)(1)); she briefed and was prepared to argue *Kiyemba v. Obama*, involving the authority of the United States courts to order the transfer of alien detainees held at the Guantanamo Bay Naval Base in Cuba into the United States (shortly before the case was argued, the Supreme Court sent it back to the court of appeals for further consideration); and she was involved in the government’s successful appeal in *Al Maqaleh v. Gates* (D.C. Circuit), involving the scope of habeas corpus with respect to alien enemy combatants held in Afghanistan. It is not possible to work on this vitally important litigation without gaining a deep appreciation for the grave national security challenges facing America in the war on terror and a profound gratitude for the men and women in our military services around the world who are confronting those challenges on a daily basis.

Finally, as Solicitor General, General Kagan has had an opportunity to work with – and, like all Solicitors General, learn from – the enormously talented and dedicated career lawyers in the Office of the Solicitor. These men and women – like Deputy Solicitor General Edwin Kneedler, who has served in the Office for decades and himself argued more than 100 cases before the Supreme Court – not only among the finest lawyers in the land but the finest public servants as well. Collectively, these lawyers have briefed and argued literally thousands of cases before the Supreme Court and they have an unparalleled knowledge of the Court and profound respect for both the Court as an institution and its Members. During her tenure as Solicitor General, General Kagan has earned the confidence, trust, and deep admiration of the career lawyers and other personnel of the Office of the Solicitor General. I cannot think of a higher

compliment when it comes to her service as Solicitor General, or better affirmation that she possesses the intellect, fair-mindedness, and dedication to duty and the rule of law that are the hallmarks of a Supreme Court Justice.

Prior Judicial Service Is Not A Prerequisite To Service On The Court

General Kagan's service as Solicitor General rounds out and bolsters in important respects the breadth of experience and reputation for excellence that she had already before becoming Solicitor General – as a Supreme Court law clerk, lawyer in private practice, top advisor to the President, law professor, and dean at perhaps the finest law school in the country. General Kagan does not have prior judicial experience. But, as history shows, prior judicial experience is by no means a necessary prerequisite to exemplary service on the Supreme Court, and it especially ought not be viewed as a prerequisite to service on the Court for someone with General Kagan's significant and varied legal experience and training.

Judicial service in the lower federal courts or state courts is certainly a valuable and natural training ground for service on the Supreme Court. But in our nation's history, some forty individuals who served on the Supreme Court have joined the Court with no prior judicial experience. (A list of those individuals is included in the addendum hereto.) And any argument that prior judicial service is a necessary qualification for service on the Court is strongly refuted by simply listing a few of the Justices who lacked such experience – John Marshall, Joseph Story, Louis Brandeis, Felix Frankfurter, Robert Jackson, and William Rehnquist. I was extremely privileged to serve as a law clerk to Chief Justice William Rehnquist, who also joined the Court from a high-ranking position in the Department of Justice (Assistant Attorney General for the Office of Legal Counsel), and he served with great distinction on the Court. The unique perspectives of individuals, like Chief Justice Rehnquist, who have taken different paths before

joining the Court likewise almost certainly benefits the Court as a whole. Particularly given the rich background and experience – including as Solicitor General – that General Kagan would bring to the Court, the absence of prior judicial experience is in my view inconsequential.

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The Constitution grants the President broad leeway in determining how to fulfill the great responsibility of filling a seat on the Supreme Court of the United States. And this Committee considers few matters as important as the nomination of an individual to serve on the Court. In undertaking that task, this Committee customarily looks to the entirety of a nominee's background, experience, and body of work. While I will leave it to other witnesses to opine on how other aspects of General Kagan's background, experience, or philosophy will serve her on the Court, I am confident that, if confirmed, General Kagan's experience as Solicitor General will be a great asset to her. And, like my predecessors as Solicitor General going back to 1985, who have served in different Administrations and hold widely varying views on the important legal issues facing the country, I am pleased to support General Kagan's nomination to be Associate Justice of the Supreme Court, and urge the Committee and Senate to do so as well.

Thank you, Mr. Chairman, Ranking Member Sessions, and Committee Members for the privilege to testify before you today.

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ADDENDUM

JUSTICES WHO LACKED PRIOR JUDICIAL EXPERIENCE WHEN APPOINTED TO THE COURT

- **John Jay, C.J.:** Governor of New York (1795-1801); Sec. of Foreign Affairs (1784-90); joined SCOTUS 1789 (Washington)
- **John Rutledge, C.J.:** Governor of South Carolina (1779-82); joined SCOTUS 1789 (Washington)
- **William Paterson:** Governor of New Jersey (1790-93); joined SCOTUS 1793 (Washington)
- **Bushrod Washington:** Virginia House of Delegates; joined SCOTUS 1799 (Adams)
- **John Marshall, C.J.:** Sec. of State (1800-01); US Representative from Virginia (1799-1800); joined SCOTUS 1801 (Adams)
- **Joseph Story:** US Representative from Massachusetts (1808-09); joined SCOTUS 1811 (Madison)
- **Henry Baldwin:** US Representative from Pennsylvania; joined SCOTUS 1830 (Jackson)
- **Roger Taney, C.J.:** Sec. of the Treasury (1833-34); AG (1831-33); joined SCOTUS 1836 (Jackson)
- **John McKinley:** US Senator from Alabama (1826-31, 1837); joined SCOTUS 1837 (Van Buren)
- **Benjamin Curtis:** Massachusetts state legislator; joined SCOTUS 1851 (Fillmore)
- **John Campbell:** Alabama state legislator; joined SCOTUS 1853 (Pierce)
- **Nathan Clifford:** AG (1846-48) and private practice; joined SCOTUS 1858 (Buchanan)
- **Noah Swayne:** US Attorney for Ohio; joined SCOTUS 1862 (Lincoln)
- **Samuel Miller:** Private practice; joined SCOTUS 1862 (Lincoln)
- **Salmon Chase, C.J.:** Sec. of the Treasury (1861-64); joined SCOTUS 1864 (Lincoln)
- **Joseph Bradley:** Private practice; joined SCOTUS 1870 (Grant)
- **Lucius Quintus Cincinnatus Lamar:** Sec. of the Interior (1885-88); joined SCOTUS 1888 (Cleveland)
- **Melville Fuller, C.J.:** Private practice; joined SCOTUS 1888 (Cleveland)
- **George Shiras:** Private practice; joined SCOTUS 1892 (Harrison)
- **William Moody:** AG (1904-06); joined SCOTUS 1906 (T. Roosevelt)
- **Charles Evans Hughes:** Governor of NY (1907-10); joined SCOTUS 1910 (Taft); left SCOTUS 1916; re-appointed as C.J. 1930 (Hoover)
- **James McReynolds:** AG (1913-14); joined SCOTUS 1914 (Wilson)
- **Louis Brandeis:** Private practice; joined SCOTUS 1916 (Wilson)
- **George Sutherland:** US Senator from Utah (1905-17); joined SCOTUS 1922 (Harding)
- **Pierce Butler:** Private practice; joined SCOTUS 1922 (Harding)
- **Harlan Fisk Stone, C.J.:** AG (1924-25); joined SCOTUS 1925 (Coolidge); elevated to C.J. 1941 (F. Roosevelt)
- **Owen Roberts:** Special prosecutor for the Teapot Dome scandal; joined SCOTUS 1930 (Hoover)
- **Stanley Reed:** SG (1935-38); joined SCOTUS 1938 (F. Roosevelt)
- **Felix Frankfurter:** Academic and advisor to FDR; joined SCOTUS 1939 (F. Roosevelt)

- **William Douglas:** Chairman of the SEC (1937-39); joined SCOUTS 1939 (F. Roosevelt)
- **James Byrnes:** US Senator from South Carolina (1931-41); joined SCOTUS 1941 (F. Roosevelt)
- **Robert Jackson:** SG (1938-40); AG (1940-41); joined SCOTUS 1941 (F. Roosevelt)
- **Harold Burton:** US Senator from Ohio (1941-45); joined SCOTUS 1945 (Truman)
- **Tom Clark:** AG (1944-49); joined SCOTUS 1949 (Truman)
- **Earl Warren, C.J.:** Governor of California; joined SCOTUS 1953 (Eisenhower)
- **Byron White:** Deputy AG; joined SCOTUS 1962 (Kennedy)
- **Arthur Goldberg:** Secretary of Labor; joined SCOTUS 1962 (Kennedy)
- **Abe Fortas:** Private practice and govt. service in DC, close friend of Lyndon Johnson; joined SCOTUS 1965 (Johnson)
- **Lewis Powell:** Private practice in VA; joined SCOTUS 1972 (Nixon)
- **William Rehnquist, C.J.:** Asst. AG for OLC (1969-71); joined SCOTUS 1972 (Nixon); elevated to C.J. 1986 (Reagan)

JUSTICES WHO SERVED AS SOLICITOR GENERAL OF THE UNITED STATES OR IN THE OFFICE OF THE SOLICITOR GENERAL

- **William Howard Taft, C.J.:** SG (1890-92); joined SCOTUS 1921 (Harding)
- **Charles Evans Hughes, C.J.:** SG (1929-30); joined SCOTUS (for second time, as C.J.) 1930 (Hoover)
- **Stanley Reed:** SG (1935-38); joined SCOTUS 1938 (F. Roosevelt)
- **Robert H. Jackson:** SG (1938-40); joined SCOTUS 1941 (F. Roosevelt)
- **Thurgood Marshall:** SG (1965-67); joined SCOTUS 1967 (Johnson)
- **John G. Roberts, Jr., C.J.:** Principal Deputy SG (1989-93); joined SCOTUS 2005 (G.W. Bush)
- **Samuel A. Alito, Jr.:** Assistant to the SG (1981-85); joined SCOTUS 2006 (G.W. Bush)

June 22, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Senator Sessions:

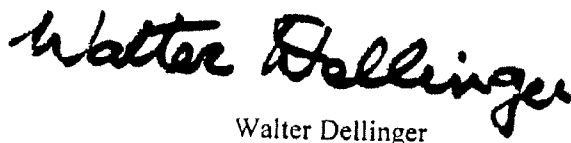
We write to support the nomination of Elena Kagan to be the next Associate Justice of the Supreme Court of the United States. We have served as Solicitors General in the administrations of Presidents Ronald Reagan, George H. W. Bush, William Clinton, and George W. Bush. We support the Kagan nomination in the same spirit of fairness and bipartisanship, and deference to presidential appointments of well-qualified individuals to serve on the Supreme Court, that was also due the nominations of then-Judges John G. Roberts, Jr. and Samuel A. Alito, Jr. to serve on the Supreme Court.

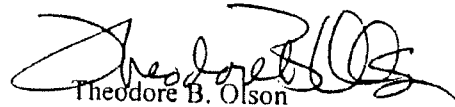
Elena Kagan would bring to the Supreme Court a breadth of experience and a history of great accomplishment in the law. In addition to her most recent service as Solicitor General, at various points of her career she has served as a law clerk to Supreme Court Justice Thurgood Marshall, she has been in private practice at one of America's leading law firms, she has served in the office of the Counsel to the President, she has been a policy advisor to the President, she has served as a law professor at two of the nation's leading law schools, Harvard and Chicago, and she has served as Dean of the Harvard Law School.

During the past year, Kagan has honored the finest traditions of the Office of the Solicitor General and has served the government well before the Supreme Court. The job of Solicitor General provides an opportunity to grapple with almost the full gamut of issues that come before the Supreme Court and requires an understanding of the Court's approach to numerous issues from the criteria for certiorari review to the Justices' approach to oral argument. The constant interaction with the Supreme Court that comes with being the most-frequent litigator before the Court also ensures an appreciation for the rhythms and traditions of the Court and its workload. Moreover, as Solicitor General, Kagan had the opportunity to work with the immensely talented career lawyers in the Office of the Solicitor General, who have a deep understanding of and appreciation for the Court. Kagan's most recent experience as Solicitor General will serve her well as she wrestles with the difficult questions that come before the Court.

The Constitution gives the President broad leeway in fulfilling the enormously important responsibility of determining who to nominate for a seat on the Supreme Court of the United States. In that spirit, we support the nomination of Elena Kagan to be Associate Justice and believe that, if confirmed, she will serve on the Court with distinction, as have prior Solicitor Generals who have had that great honor.

Respectfully,


Walter Dellinger


Theodore B. Olson

on behalf of:

**Charles Fried,
Solicitor General, 1985-1989**

**Kenneth W. Starr,
Solicitor General, 1989-1993**

**Drew S. Days III,
Solicitor General, 1993-1996**

**Walter Dellinger,
Acting Solicitor General, 1996-1997**

**Seth P. Waxman,
Solicitor General, 1997-2001**

**Theodore B. Olson,
Solicitor General, 2001-2004**

**Paul Clement,
Solicitor General, 2004-2008**

**Gregory G. Garre,
Solicitor General, 2008-2009**