

**TESTIMONY OF MARCIA D. GREENBERGER
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**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**ON THE NOMINATION OF ELENA KAGAN TO
BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT**

July 2, 2010

My name is Marcia Greenberger and I am Co-President of the National Women's Law Center ("Center"). The Center began in 1972, as did my work on women's legal rights. Since that time, the Center has been involved in virtually every major effort to secure and defend women's legal rights. I very much appreciate your invitation to testify before the Committee on behalf of the Center on an issue of such enormous importance – the nomination of Elena Kagan to be an Associate Justice of the United States Supreme Court.

The Center has the greatest respect for Elena Kagan's outstanding accomplishments, considerable legal skills, and fair-mindedness. Her qualifications and her record give great confidence that she will respect the rule of law and approach legal questions with the intent of the law and its contours as her guiding principles. We strongly support Solicitor General Kagan's nomination, and we celebrate the fact that, upon her confirmation, she will make history once again. When confirmed, she will join the other two female Justices on the current Court so that, for the first time in history,

three women will serve simultaneously on the highest Court in the land, and she will be only be the fourth woman ever to have served on the Supreme Court in 221 years.

I testify here today with extraordinary pride in this prospect, and in our country's hallmark of eliminating barriers and expanding opportunities, so that the talent and skill of every one of us can be fostered and recognized. Our country is the stronger and the surer for this progress. Elena Kagan shines as an example of the progress that our country has made, and why we are the better for it. Hers is a remarkable legal career for any person to have accomplished, but all the more so because she had to break down barriers along the way.

None of the positions she has held came to women with ease, and she excelled at each. Judge Mikva has said “she understands what the law is about . . . she was one of the best clerks I ever had,”¹ He strongly recommended her as a clerk to Justice Thurgood Marshall—a higher compliment to her as a person and to her legal skills is hard to imagine. Justice Marshall obviously agreed: she served as a clerk to this giant of a lawyer and a Justice, and was one of only a handful of other women, just seven out of 30, to clerk for the Court that term. Becoming a tenured law professor at the University of Chicago Law School in 1995, and at Harvard Law School in 2001, was not an accomplishment shared by many women. In 1994 only four women were tenured or even

¹ Andrew Greiner, *Kagan and Obama Go Way Back*, NBC CHICAGO, May 10, 2010, available at <http://www.nbcchicago.com/news/local-beat/Kagan-and-Obama-Go-Way-Back-93267019.html>.

on tenure track at the University of Chicago Law School.² The over 100,000 documents released from her positions as Associate Counsel to the President and deputy director of the White House Domestic Policy Council in the Clinton White House demonstrate for all to see the breadth of responsibility she was given and respect in which she was held. And, of course, she became the first woman to be Dean of Harvard Law School in its almost two hundred year history, and in 2009 became the first woman Solicitor General. Kudos have accompanied her performance in those most demanding roles as well.³

Given her broad background of judicial clerkships, private law practice, academia, and government service, including as Solicitor General of the United States, and her experience in a broad array of legal issues, coupled with the extraordinary outpouring of bipartisan support she has received,⁴ it is hardly surprising that she received a unanimous rating of Well-Qualified from the ABA's Standing Committee on the Federal Judiciary. Our review of her record led the Center to conclude that, indeed, if

² Press Release, Stanford University, Law Professors Differ on Affirmative Action (Oct. 25, 1994), available at <http://news.stanford.edu/pr/94/941025Arc4083.html>.

³ For example, Michael McConnell, the Director of the Constitutional Law Center at Stanford Law School, wrote a letter in support of Elena Kagan to the Senate Judiciary Committee stating that "By universal acclaim, across the political spectrum and among both students and faculty, Elena Kagan was an exemplary Dean of Harvard Law School." Letter from Michael McConnell to United States Senate Judiciary Committee (June 25, 2010), available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/062510MichaelMcConnell.pdf>. And in a letter to the Senate Judiciary Committee the last eight Solicitors General wrote in support of Elena Kagan's confirmation, "During the past year, Kagan has honored the finest traditions of the Office of Solicitor General and has served the government well before the Supreme Court." Letter from Former Solicitors General to United States Senate Judiciary Committee (June 22, 2010), available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/062210JointLetter.pdf>.

⁴ Her nomination has the bipartisan support of nine former Solicitors General, 69 law school deans, and nearly 30 of her former co-clerks on the Supreme Court. Her nomination has also been endorsed by such organizations as the National Association of Women Judges, the National Association of Women Lawyers, the National Partnership for Women and Families, the Leadership Conference for Civil and Human Rights, the Alliance for Justice, the NAACP, the NAACP Legal Defense Fund, the National Council of Jewish Women, the Women's Bar Association of the District of Columbia, the National Senior Citizens Law Center, and the Older Women's League.

confirmed, her approach to legal questions would be open-minded, scrupulously fair, and in keeping with the law's purpose and intent.

I will briefly summarize some of the elements of Solicitor General Kagan's record that led us to support her nomination.

All Americans rely upon our Constitution and laws to ensure that our fundamental freedoms are protected, and that fairness and equal opportunity, through the rule of law, are not only bedrock principles, but a reality in our daily lives. Women have a particularly great stake in equal justice and judges' commitment to give life and vitality to the laws of our land. It is therefore of the greatest importance that a nominee understand and protect the legal rights of ordinary Americans, including women's constitutional rights under the Equal Protection Clause and the right to privacy, as well as the core statutory protections women fought so hard to secure in such fundamental areas as education, employment, health and safety, and economic welfare. Elena Kagan's record demonstrates that she will bring to the Court that understanding and commitment to the rule of law and to equal justice.

Women have a great stake in the application of constitutional and statutory protections against sex discrimination and other forms of discrimination that is faithful to the purpose of these protections. Elena Kagan's record includes descriptions of many of the efforts she has made to ensure that antidiscrimination protections are available in all spheres, including at work and at school, to those whom the law is intended to protect.

She worked to ensure these laws were not distorted or ignored in order to protect powerful institutions bent on continuing unfair discrimination that has so injured women and their families over the years. She testified before this Committee during her Solicitor General hearings, “I view as unjust the exclusion of individuals from basic economic, civic, and political opportunities of our society on the basis of race, nationality, sex, religion, and sexual orientation.”⁵ And a series of documents released reflecting her work during the Clinton Administration show she had substantial familiarity with the key civil rights protections so important to women, and made efforts to ensure their effective implementation. For example, during her service in the Clinton Administration, she worked on Executive Order 13,160, which broadly protected against discrimination in federally-conducted educational and training programs on the basis of sex, race, ethnicity, and several other forms of invidious discrimination.⁶ Before this Executive Order was issued, while Title IX, for example, prohibited sex discrimination in education programs receiving federal financial assistance, its protections did not apply to these programs run by the federal government itself. That gap in coverage applied to Title VI of the 1964 Civil Rights Act and the Age Discrimination Act as well. Executive Order 13,160 addressed this gap, and assured that the statutes’ protections against sex discrimination and the other prohibited bases of discrimination applied to the federal government itself. Elena Kagan also worked to increase funding for civil rights enforcement across agencies with civil rights responsibilities, and to establish mechanisms to coordinate and

⁵ Elena Kagan, Answers to Written Questions of Sen. Specter (Feb. 10, 2009) at 9, *available at* <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.

⁶ *See, e.g.*, Memorandum to Phil Kaplan from Nicole Rabner (June 12, 1997); Memorandum for Distribution from Jennifer Klein and Nicole Rabner (June 11, 1997); *see also* Exec. Order 13,160, 65 Fed. Reg. 39775 (June 27, 2000) (“Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs”).

strengthen enforcement efforts across agencies.⁷ Further, she worked on legislation expanding federal protections against hate crimes, including those based on gender.⁸ That legislation has finally been enacted, and many in this country, including women, are the safer for it.⁹

The right to privacy and its application to women is a second pillar upon which women rely. Available documents show, particularly from her days as a law clerk to Justice Marshall and her service in the Clinton Administration, that Elena Kagan supports the constitutional right to privacy, and its application to women in *Roe v. Wade*. As a law clerk, she identified a concern to Justice Marshall about the possibility that the Court might undermine *Roe v. Wade*.¹⁰ And while serving at the White House in the Counsel's Office and on the Domestic Policy Council, she again grappled with attempts to overturn *Roe v. Wade*'s core protections for women, in the context of proposed legislation then

⁷ See, e.g., Fact sheet, The Clinton Administration Announces New Civil Rights Enforcement Initiative, Jan. 19, 1998.

⁸ See, e.g., Memorandum from Legislative Subgroup to Hate Crimes Working Group, Proposed Bill to Amend 18 U.S.C. 245 (June 30, 1997).

⁹ Beyond this work in the Clinton Administration, she has participated in the Boston Bar Association Diversity Task Force, spoken on problems women face in the legal profession and suggested concrete actions to ameliorate those problems, served as a member of the Harvard University's Task Force on Women Faculty, and taken steps to diversify the student body at Harvard Law School, with good results. Elena Kagan, *Women and the Legal Profession - A Status Report* (Leslie H. Arps Memorial Lecture), 61 THE RECORD 37 (2006), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/SolicitorGeneral-ElenaKagan.cfm>; Brent L. Henry & Michael E. Mooney, Co-Chairs, Boston Bar Association Diversity Leadership Task Force, *Recommendations of the Boston Bar Association Diversity Leadership Task Force*, Nov. 18, 2008, available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/12B-1-111808BostonBarAssociationDiversityLeadershipTaskForce.pdf>. That the same positive results did not occur regarding diversity in faculty hiring during her tenure as dean of the Law School is very disappointing. It is, of course, proper to explore concerns about these results, as well as any other civil rights issues that arise in connection with her record.

¹⁰ Memorandum from Elena Kagan to Justice Thurgood Marshall (Apr. 26, 1988), available at <http://documents.nytimes.com/a-selection-of-kagans-marshall-memos#document/p12>.

pending in Congress.¹¹ We draw the conclusion from this record that she will respect *Roe v. Wade* and the protections for women that are at its core. We are mindful of the fact that the available documents reflect her attempts, pursuant to her responsibilities in the positions she held, to advance the views of the Justice for whom she clerked and the Administration and the President she was there to serve, and therefore, they are not entirely dispositive regarding her own judicial philosophy. Nonetheless, the absence of any suggestion in these documents that she is hostile to *Roe* and its core holding is reassuring.

Finally, with respect to other health and safety concerns of women, it is worthy of note that during her tenure as Solicitor General, Elena Kagan decided to argue personally as *amicus* in *Robertson v. United States ex rel. Watson* (No. 08-6261), a case which dealt with prosecutions of violations of civil protective orders. These orders can be an important tool to protect victims of domestic violence. At least fourteen states, in addition to the District of Columbia, have statutes that permit private litigants to bring criminal contempt proceedings for violations of civil protective orders. I highlight this case, in contrast to other cases handled by the Solicitor General's office with a bearing on women's rights, because it was one that Elena Kagan chose to argue herself. Also noteworthy is the apparent attention she gave to the case. In her oral argument, she elaborated on an argument in the Solicitor General's brief in a way that provided more support to the ability of private litigants to initiate contempt proceedings for violations of civil protection orders. While this case did not result in a ruling on the merits, Solicitor

¹¹ See, e.g., Memorandum from Elena Kagan & Bruce Reed to the President, Subject: Daschle and Feinstein Amendments (May 13, 1997).

General Kagan's personal efforts and involvement evidence a concern for and an understanding of the ways in which the legal system can affect victims of domestic violence.¹²

Even this brief review of Solicitor General Kagan's record demonstrates the extraordinary range of legal issues she has addressed, the important and varied positions that she has held, and the breadth of legal knowledge and life experience that she would bring to the Court if confirmed. Her record also demonstrates why I testify on behalf of the Center with the greatest respect for her outstanding accomplishments, considerable legal skills, and ability to be fair. That is not to say that we agree with all of the legal or policy positions taken by her and the Administrations she has served,¹³ nor that we would necessarily agree with all of the decisions she would reach on the Court. But her commitment to respect the law and the protections it provides to the women of the country is clearly demonstrated.

While the Center's analysis began with Solicitor General Kagan's intellect, legal accomplishments, and commitment to the rule of law, I must conclude with some words about the great advance for the country it will be when, for the first time in the nation's history, three women sit on the Supreme Court together. Experience has shown that one, even two women on the Supreme Court are seen as exceptions to the rule. Perhaps the

¹² In a per curiam order without opinion issued on May 24, 2010, the Court dismissed this case as improvidently granted. *Robertson v. United States ex rel. Watson*, 560 U.S. ____ (2010).

¹³ For example, in documents reflecting debates within the Clinton Administration on whether to grant the state of Wisconsin's request to waive various provisions of the Aid to Families with Dependent Children, Food Stamps and Medicaid programs in order to carry out a state welfare demonstration program, she made both policy and constitutional arguments with which we disagree. See, e.g., Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman, Wisconsin Waiver Application (June 10, 1996).

clearest demonstration came when, during oral arguments, even experienced members of the Supreme Court bar would call Justice O'Connor and Justice Ginsburg by each other's name. Moreover, an unrealistic expectation and heavy burden fall on only one or two women to somehow bring the experience of all women to bear. That may be why, following the announcement of Solicitor General Kagan's nomination, former Justice Sandra Day O'Connor said that three women on the Court could make a big difference. "I'm so pleased," she said. "That's much better than one or two."¹⁴

A Supreme Court that includes three women is more reflective of the diverse population of this nation and gives women, and men, a greater sense that their lives and needs, and those of their family, are understood by the Court. With Elena Kagan on the bench, the country will be one step closer to the day when it is not only accepted, but in fact expected, that women are just as likely as men to be on the Supreme Court or in any position of great importance.

But perhaps even more fundamental, the quality of justice is improved for both men and women when the bench is more representative. One recent study demonstrated that male federal appellate court judges are more likely to see aspects of the law differently, particularly regarding claims of sex discrimination, if a female judge is on the panel.¹⁵ This may be because, as Justice Ginsburg said in a speech last year, "Even

¹⁴ Greg Stohr, *Kagan Would End Gender Bar as Third Female Justice*, BLOOMBERG BUSINESSWEEK, May 27, 2010 (updated June 1, 2010), available at <http://www.businessweek.com/news/2010-05-27/kagan-would-end-gender-bar-as-third-female-justice-update1-.html>.

¹⁵ Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010), available at <http://epstein.law.northwestern.edu/research/genderjudging.pdf>. Studies outside the judicial context strongly suggest that even as few as three women can make a major difference that two women do not in the deliberative process. In the context of corporate

though a wise old man and a wise old woman will reach the same decision, there are life experiences a woman has that come from growing up in a woman's body that men don't have."¹⁶ Those experiences can enrich the deliberative process for all of the judges—or Justices. This was nowhere clearer than in *Safford Unified School District v. Redding*.¹⁷ In that case, a girl and her mother sued her school district because, at age 13, school officials subjected her to a strip-search because they suspected that she was hiding ibuprofen. At oral argument, Justice Ginsburg, then the sole woman on the Court, described the humiliation and indignity a teenaged girl would have suffered by being forced to strip and even shake out her underwear in front of school officials.¹⁸ A number of the male Justices questioned why it was so traumatic—one thinking back, for example, to experiences in locker rooms as a 13-year-old male. Significantly, when the Court rendered its decision, eight Justices joined the ruling that the search violated the student's constitutional rights, due no doubt at least in part to the perspective that Justice Ginsburg brought to the consideration of the case. Elena Kagan's record, as described above, demonstrates that she has the capacity, and the breadth of life experience, to bring an understanding of the impact of the law on the lives of women and girls to the bench, and to enrich the Court's understanding of how best to realize the intended purpose and effect of the law that the Court is charged with applying.

boards, for example, one study found that once three or more women serve on a board, "women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially." Vicki Kramer, Alison Konrad, & Sumru Erkut, Executive Summary at 2, *Critical Mass on Corporate Boards: Why Three or More women Enhance Governance*, Wellesley Centers for Women, 2006. Studies have also shown that when the percentage of women in legislatures surpasses a minimum – generally 30% -- women are able to introduce and pass more bills on women's issues. Sarah Childs & Mona Lee Krook, *Critical Mass Theory and Women's Political Representation*, 56 POL. STUD. 732 (2008).

¹⁶ Joe Hallett, *Ginsburg Wants Court to Add Second Woman*, COLUMBUS DISPATCH, Apr. 11, 2009, available at http://www.dispatchpolitics.com/live/content/national_world/stories/2009/04/11/ginsburg.ART_ART_04-11-09_A3_HLDH9PG.html?sid=101.

¹⁷ 557 U.S. ___, 129 S. Ct. 2633 (2009).

¹⁸ Transcript of Oral Argument at 45-46, *Safford*, 557 U.S. ___ (No. 479).

In short, Elena Kagan's record is one that demonstrates that she, as President Obama suggested when he announced her nomination, is indeed a worthy successor to retiring Justice John Paul Stevens.

Conclusion

Justice O'Connor recently noted that Canada has four women on its nine-judge high court, including a female chief justice. "Now what's the matter with us?" she was quoted as saying. "You know we can do better."¹⁹ With the confirmation of Solicitor General Kagan to the Supreme Court, this country rightfully continues on the road to doing better. Our country's history is a history of barriers being broken, of remarkable individuals being the first, to be followed by seconds and thirds, and finally of reaching a point where the additions are no longer of note. It is in keeping with the proud tradition of this country to have such an accomplished woman as Elena Kagan confirmed to join the two other distinguished women currently on the Supreme Court.

Thank you again for this opportunity to testify before the Committee.

¹⁹ Larry Neumeister, *O'Connor: More Justices May Skip State of Union*, ASSOCIATED PRESS, Apr. 6, 2010 available at <http://abcnews.go.com/US/wireStory?id=10302946>.