

TESTIMONY OF RONALD S. SULLIVAN JR.

PREPARED FOR THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

HEARING: JUDICIAL NOMINATION

ELENA KAGAN OF MASSACHUSETTS

TO BE

ASSOCIATE JUSTICE OF THE SUPREME COURT

OF THE UNITED STATES

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I am a Clinical Professor of Law at the Harvard Law School and a Senior Fellow at the Jamestown Project. I teach and write in the areas of criminal law, criminal procedure, legal ethics, and race theory. Prior to joining the faculty at Harvard, I served as Director of the nation's premier public defender office, the Public Defender Service for the District of Columbia, where I represented hundreds of indigent clients in thousands of matters as a staff attorney, General Counsel, and, then, Director.

Let me begin with the obvious: Anyone who has had even a passing acquaintance with Elena Kagan can attest to the fact that she has a first-class mind. An outstanding legal scholar, terrific teacher, a thoughtful and forward-looking administrator, Solicitor General Kagan's academic record is unassailable. More than her academic career and work, there is her record as a public servant, a proven one: as a government lawyer, as a policy advisor to President Clinton's administration, and as our current administration's Solicitor General. She is smart, fair, independent, respectful of the opinions of others, and a dedicated public servant. For these reasons and others that I outline below, I urge this Committee to vote out the nomination.

Hearings on Supreme Court nominations represent an important expression of our democracy. This Committee attempts to carefully balance important norms of judicial autonomy with notions of democratic accountability in crafting questions it poses to the nominee and witnesses. Understandably, the degree to which a nominee's judicial philosophy is the appropriate metric for judging her fitness to receive life tenure on our nation's highest court is hotly contested. But, whether framed in the vocabulary of judicial philosophy or formal notions of professional or intellectual aptitude, the central question that has animated recent Supreme Court nomination hearings is, "What kind of

Justice will the nominee be?” This one is no different. Inasmuch as General Kagan has not published on the contentious and controversial areas of constitutional law that tend to dominate the public discourse, the public looks for signs – proxies, even – to provide a window into the jurisprudential leanings of a prospective Justice.

To my thinking, many proxies that have been bandied about the media are not especially productive. They do not speak to the type of Justice Elena Kagan will be, if confirmed. Indeed, the structural divides that entail our judicial system often work to ensure that its actors behave in a role appropriate manner. Positions taken as a student, or law clerk, even as a lawyer in private practice, on behalf of a client, for example, do not necessarily presage how that same lawyer will rule as a judge. Advocacy in our system, as you know, does not require agreement with the position, policies, or person of the client – whether it be a Supreme Court Justice, President or private corporation – on whose behalf one advocates. Rather, advocacy requires, we are taught from the moment we enter law school, diligence, precision, reasoning both critical and creative, and an unabated passion for the rule of law – qualities General Kagan possesses in abundance. To the extent we can know what type of Supreme Court Justice General Kagan would make, the better approach, in my view, is to look at the whole person – her entire record, as an academic, an administrator, and a policy advisor. Equally important, a fair valuation of General Kagan’s character will better illuminate the values she would bring to the bench should the Senate confirm her. On balance, these metrics demonstrate General Kagan to be thoughtful, measured, keenly intellectual, and a dedicated worker.

With this in mind, I would like to offer a few observations about the person I know, my former colleague, my former Dean, and, I am proud to say, my friend, Elena Kagan.

Given that much of my academic work concerns issues of access to justice, I am impressed by Elena's record on developing clinical programs while serving as the Dean of the Harvard Law School. As this Committee knows, Clinical programs provide expert legal services to people, communities, businesses, and even governments that could not otherwise afford such services. Core principles of our justice system – equal protection under the law, equal access to justice, and the fair distribution of burdens and benefits across the citizenry – were advanced by Elena's support and interest in clinical programs at the Harvard Law School during her tenure as Dean. Concrete people and institutions were provided with legal services and her efforts as Dean demonstrated a firm commitment to these values.

Significantly, the Harvard student body responded to Elena's efforts and commitment to providing legal services to underserved communities. The number of students participating in clinical programs grew by an astounding 240% -- from 363 clinical students when her deanship began to 866 students when she resigned to become Solicitor General. This translates into a very real appreciation for the needs, desires, and aspirations of communities around the country. As Dean, Elena understood that the law is not merely a closed system of rules with no impact on the normative universe. She also understood, as Dean, that the law impacts people, and affirmatively undertook efforts to connect some of the best legal minds in the country with those who are most in need of expert legal services. These values, fully embraced during Elena's tenure as Dean, were also embraced by the student body at Harvard Law School. During Elena's tenure as Dean, the number of hours students dedicated to pro bono work rose by 158%. I know from personal experience the kind of impact pro bono work can have on the arc of

one's professional career, as my exposure to pro bono work while, myself, a student at Harvard Law School shaped my choice to serve the underserved and indigent with the best legal training our country has to offer, expertise my former clients would otherwise not be able to afford. The clinical work done at Harvard, and supported by Elena during her time as Dean, is not merely another line added to a student's resume. Rather, clinical work is the place where some of our nation's brightest legal minds decide to use those minds in public service of our democracy—Elena's support and expansion of clinical work will have an impact on the quality of our legal system that cannot be quantitatively measured.

Specifically, under her deanship, nine clinics were created: (1) Child Advocacy Clinic, (2) Gender Violence Clinic, (3) Environmental Law and Policy Clinic, (4) Semester in Washington Clinic, (5) Negotiation and Mediation Clinic, (6) Death Penalty Clinic, (7) Sports Law Clinic, (8) Supreme Court and Appellate Advocacy Clinic, and (9) War Crimes Prosecution Clinic. The substantive variety of these clinical offerings speak to and speak well of Elena's commitment to broadly understanding the law and its important and varied role in our society.

Let me next say a word about General Kagan's intellect and intellectual method. While I have read all of her scholarship in preparation for this hearing, I do not purport to be expert in her areas of academic interest. I happily defer to the Administrative Law and First Amendment scholars who have already opined, in one form or another, to this Committee. That said, I have had sufficient scholarly interactions with her to form an opinion consistent with many others: Elena Kagan has a sharp analytical mind. She is a first-rate legal scholar, and well exceeds any minimum standards necessary to serve as a

Justice on the Supreme Court. Indeed, in my experience with General Kagan, I found her to be an active consumer of knowledge. She has a swift and eager mind, and sought to understand complex issues before comment or action. While she had many answers (not so rare for a Harvard professor), she knew that she did not have all the answers (somewhat more rare, and quite refreshing, indeed, for a Harvard professor). I clearly recall instances during her deanship where she consulted me on issues regarding the criminal law, access to justice, and indigent defense about which she was asked to opine. My sense is that these consultations were genuine, and never superficial gestures designed to provide psychic income. Instead, Elena always sought to critically engage. Clearly, she held (and holds) firm opinions, but, in my experience, she understood her opinions to be always already in progress, and subject to revision when facts and reason conspired to produce a better answer.

Allow me to pause here and emphasize the importance, I believe, of General Kagan's demonstrated commitment to challenging her own opinions and her willingness sometimes to revise, or amend her opinions in the light of continued study and collegial exchange. In our understandable insistence on trying to know, or trying to predict how a nominee will rule on this or that area of the law as a Justice, we have, perhaps, undervalued the ongoing work Justices do, work required because of the case by case nature of our judicial system. Each case heard before our Supreme Court requires not so much a pre-determined judicial philosophy or method of interpretation as much as it requires broad and continual learning, experience, a willingness to hear the case before the court prior to deciding how the case fits within some pre-determined judicial philosophy of interpretation. This temperament – the willingness to hear, study, question,

and sometimes revise – strikes me as judicious, an ideal trait for a Supreme Court Justice, and qualities that Elena Kagan possesses.

Finally, I shall end by recounting one of General Kagan's first acts as Dean. As the incoming Dean, she could have decided to hold the Royall Professorship of Law, the law school's first endowed chair. She declined. The Royall Professorship is named after Isaac Royall Jr., who donated over 2100 acres of land to Harvard in the mid-eighteenth century. But the Royall family earned its immense fortune from the trans-Atlantic slave trade. Because this chair was funded with profits from slavery, Elena Kagan opted to become the first person to hold the Charles Hamilton Houston Professorship, an endowed chair named after one of the most prominent African-American graduates of the Harvard Law School, and the architect of the legal strategy that underwrote the modern civil rights movement. This was a significant statement made by the Dean of one of the nation's top law schools, and a gesture that many in the Harvard community very much appreciated.

In the end, I submit that any fair read of General Kagan's character, career, and scholarship inevitably lead to the conclusion that she is intellectually gifted, fair-minded, hard-working, and an independent thinker. Should this Committee and this Senate consent to her nomination, she will make an outstanding Associate Justice of the Supreme Court of the United States.

Thank you for the opportunity to testify. I look forward to answering any questions the Committee may have.