

United States Senate Committee on the Judiciary
Hearing on the Nomination of Elena Kagan
to be an Associate Justice of the Supreme Court of the United States

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Prepared Statement of
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Members of the Committee:

Thank you for the opportunity to comment on the nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States.

I am a professor at Harvard Law School. I previously served in the George W. Bush administration as Assistant Attorney General, Office of Legal Counsel from 2003-2004, and as the Special Counsel to the General Counsel of the Department of Defense from 2002-2003. I have also taught at the University of Virginia and University of Chicago law schools. My teaching and scholarship focus on national security law, international law, foreign relations law, and internet law.

I have come to know Elena Kagan well since Harvard Law School hired me in 2004 during her tenure as dean. (We had met briefly a few times before then.) In the last six years, I have seen Kagan up close in many settings. We have had hundreds of conversations, many about the law. I have also read some (but not all) of her scholarship. Based on my experiences with Kagan, my reading of her scholarly work, and my assessment of her very successful legal career, I believe that she will be a truly outstanding Supreme Court Justice. I urge this Committee to approve her nomination and the entire Senate to confirm her.

Experience

Some have questioned Kagan's qualifications for the Supreme Court because she has not previously served as a judge. The criticism is belied by the fact that many of our greatest justices – including Chief Justices Warren and Rehnquist, and Justices Black, Brandeis, Frankfurter, Jackson, Powell, and White – did not serve as judges before joining the Supreme Court. And contrary to the criticisms, I believe that Kagan is among the most qualified candidates for the Supreme Court in many years.

Kagan possesses an extraordinary knowledge of the legal issues before the Supreme Court. Whatever else may be said about being a law professor, it is a profession that requires one to know legal subjects comprehensively enough to teach them. As an

academic, Kagan taught and was expert in constitutional law, administrative law, First Amendment law, civil procedure, and labor law. These subjects constitute a large chunk of the Supreme Court's docket. In addition, as Solicitor General Kagan did much more than argue six cases before the Supreme Court. She read many hundreds of briefs in cases before the Court, and thought broadly about the entire docket of the Court and the issues facing the Justices. Her broad academic expertise and her tenure as Solicitor General, taken together, make Kagan unusually prepared to understand and address the array of issues that come before the Court.

In addition, few nominees in recent memory have had Kagan's breadth of legal experiences. After graduating magna cum laude from Harvard Law School, she clerked for Thurgood Marshall at the Supreme Court. She worked on complex civil litigation cases at Williams & Connolly, one of the finest law firms in the nation. She served as a lawyer in the legislative branch as Special Counsel to the Senate Judiciary Committee. She served in the White House in the Counsel's office and as an assistant to the President for Domestic Policy. She was a law professor at two of the best law schools in the country where she was a great teacher and wrote important legal scholarship. She was Dean of Harvard Law School. Then she became Solicitor General. In short, she has had an unusually rich and varied life in the law. And she has been extraordinarily successful in each of these very different legal roles.

Kagan's breadth of relevant experience does not end there. One aspect of her record that has been underappreciated is her experience running the small business known as Harvard Law School. As dean, Kagan was the chief executive officer of a 500-person non-profit organization. She had to set a budget, make a payroll, and address a variety of employee issues. She also felt the bite of an array of private and public regulations. For example, when she added a large new building to the Harvard Law School campus, she had to deal with city of Cambridge, Massachusetts concerning its zoning, planning, and historical landmark ordinances. She thus appreciates firsthand the effects of regulation on firms. These are valuable experiences that will inform Kagan's work on the Court, especially in the many important regulatory cases that affect for-profit and not-for-profit organizations. They are also experiences of a type not possessed by any Supreme Court nominee in recent memory.

Attitude Toward Law

Kagan is one of the smartest lawyers I know. She also cares deeply about law and legal craft. I base this judgment on my reading of her scholarship and on my many conversations with her about law.

Our first conversation about the law, in 1994, was for me a memorable one. I was an entry-level law professor candidate visiting the University of Chicago, where Kagan was teaching at the time. We were at dinner the night before I was due to make a presentation to the Chicago faculty of my work on the role of federal courts in deciding foreign relations controversies in the absence of legal guidance from Congress. Kagan was unable to attend the faculty talk, so she asked me about my presentation over dinner.

I gave her a short summary. She responded with an avalanche of difficult questions that pressed me to clarify my thesis and that pushed me on its implications for matters ranging from the conflicts of law to the *Erie* doctrine to the meaning of the Commerce Clause.

I had been on the teaching market for many months and had discussed my work with dozens of professors. But I had not encountered Kagan's razor-sharp and clarifying questions – questions that exposed weaknesses and inconsistencies in my thesis. Kagan knew little about a small corner of the law I knew well, but she quickly grasped my central point and questioned whether it cohered with broader legal doctrines and principles. Here was someone who took legal doctrine very seriously, someone who by instinct cared a lot about getting the doctrine and the case holdings and the broader legal theoretical landscape just right, and someone who was remarkably knowledgeable about the law and unusually adept at legal argument.

I witnessed a similar attitude toward the law countless times during my five years with Kagan at Harvard. In scores of appointments committee meetings involving candidates who had written papers on all manner of topics from many different theoretical perspectives, Kagan was the one who cared most about the quality of legal arguments. And in dozens of faculty workshops, Kagan consistently asked insightful questions that often pressed the paper presenter about real-world legal implications. (In both settings, by the way, it is unusual that a busy dean with so many other responsibilities is consistently able to prepare and participate so fully and meaningfully.)

Kagan's scholarship displays similar qualities. The thesis of her most important work, *Presidential Administration*, is that the President has broad power to craft policy through the control of the executive branch bureaucracy, but that this power is best understood to be grounded, ultimately, in congressional approval. The article is theoretically informed but falls squarely in the tradition of doctrinal legal scholarship that assesses how law works, and should work, in the real world. It is filled with insights about the operation of law on the ground in the Executive branch, Congress, and the courts. And it takes law seriously as a tool for both empowering the presidency and constraining and legitimizing it.

In sum, Kagan views the law with earnest respect; she thinks it has a reality, an autonomy, and a constraining bite. This is an important quality for service on the Supreme Court. While I do not purport to speak for fellow conservatives of various stripes, I think this quality is one reason why so many prominent conservative lawyers who know Kagan well admire her and support her confirmation. John Manning, who has known Kagan since law school, writes in his letter of support that she is “careful and reflective in her legal analysis” and “cares deeply about law and the legal craft.” Michael McConnell, who was Kagan's colleague at the University of Chicago and has known her for twenty years, writes that she has “demonstrated a fidelity to legal principle even when it means crossing her political and ideological allies.” And Paul Cappuccio, Miguel Estrada, and Peter Keisler, joining a letter from twenty-nine lawyers who clerked with Kagan on the Supreme Court, comment that during that clerkship year she displayed “a superb legal mind” and was “remarkably fair-minded and intellectually honest.” These are

extraordinary testaments to Kagan's commitment to the integrity of the law, and should count heavily in favor of her confirmation.

Temperament

A final important consideration is Kagan's temperament. Kagan is genuinely interested in listening to all sides of an argument, to engaging colleagues frankly and charitably, and to exercising judgment openly. These are obviously important qualities for a Justice.

The record shows that Kagan has possessed these qualities all of her professional life. The letter from the law clerks, which comments on Kagan at the dawn of her career, states:

Regardless of whether any given one of us agreed or disagreed with Elena on a particular issue, however, we came to appreciate her approach in those situations. She always has had a wonderful temperament, and is an extraordinary listener who is genuinely interested in what other people think. Elena is able to advance, and at times adjust, her positions while maintaining respect for and openness to other views.

And as is well known, these same qualities – in combination with Kagan's vision and imagination, her fierce work habits, her extraordinary management skills, and her good judgment – were instrumental in bringing harmony to the discordant Harvard Law faculty, and to making Harvard Law School an intellectually richer and intellectually more diverse law school.

It is a little awkward for me to comment on Harvard Law School's doubtless improvement under Kagan's deanship. For one thing, I was not there before she became Dean. (My sense is that she extended and accelerated improvements begun under her predecessor, Robert Clark.) For another, her hiring and defense of me – a conservative scholar who came to Harvard from the Bush administration – are often held up as evidence of her open-mindedness and commitment to intellectual diversity. With these caveats, I do think that Kagan's actions as dean demonstrate a profound commitment to the frank and open exchange of ideas, and reveal a temperament ideally suited for the Supreme Court.

Kagan was not, I believe, interested in balance for balance's sake. Rather, she thought that intellectual excellence in a law school required an intellectual environment where every idea can flourish. (This might seem like an obvious point, but in the American legal academy, and especially among the most elite law schools, it is far from obvious and not at all established.) For example, she not only supported the conservative Federalist Society (which has a membership of over four hundred Harvard Law students, and is one of the largest student organizations in the law school); she took pride in its many contributions to the intellectual life of the law school. On a more personal note, in many conversations on many matters, Kagan sought my views and expressed a genuine interest in my arguments and ideas. I never got the sense that she wanted to know what I

thought as a conservative. For Kagan, it was the idea and the argument that mattered, and not their political or ideological provenance.

Kagan's engagement with people and their ideas on the merits rather than through an ideological lens, and her openness to ideas and debate, are in my view the distinguishing characteristics of her deanship. They are characteristics that, through her actions and the force of her personality, she stamped on the Harvard Law School community. I agree with Michael McConnell that this aspect of Kagan's deanship "demonstrate[s] qualities of mind and character that are directly relevant to being a Justice on the Supreme Court: respect for opposing argument, fair-mindedness, and willingness to reach across ideological divides, independence, and courage to buck the norm."

Kagan's warm and open embrace of all manner of students from all walks of life extended to those students who were current and past members of the U.S. armed forces. Whatever one thinks about the decisions Kagan made in connection with the Solomon Amendment, I can attest that she genuinely and deeply admired the U.S. military and those who served in it. I know this not only because of the things she did to honor veterans, and not only because the veterans I knew were happy and fully integrated at Harvard Law School. I know it also because we had at least two conversations when she was drafting her 2007 West Point Speech. In those conversations she made plain her esteem for the military and military service, and sought my counsel (and, I am sure, the counsel of others) about how best to express it. Based on these conversations, I have no doubt that she meant it when she said in that speech that she was "in awe" of the cadets' "courage and dedication, especially in these times of uncertainty and danger," that her "security and freedom and indeed everything else I value depend on all of you," and that she wished the cadets "godspeed as you go forward to serve your country and your fellow citizens in the greatest and most profound way possible."

Conclusion

It is discouraging that I feel compelled to add, in closing, that nothing in my assessment of Kagan's suitability to be a Supreme Court Justice turns on a prediction of how she will vote on particular cases as a Justice. Many people assume – based on her service in the administrations of two Democrat presidents, and the fact that President Obama nominated her – that on many legal issues Kagan's will come down on the left. It would be surprising if this assumption were not true to some degree; but I do not know it to be true. What I do know is that Kagan will be open-minded and tough-minded; that she will treat all advocates fairly and will press them all about the weak points in their arguments; that she will be independent and highly analytical; and that she will seek to render decisions that reflect fidelity to the Constitution and the laws.

The President of the United States is entitled to choose a judicial nominee whom he believes reflects his judicial philosophy; and his decision to nominate a highly qualified individual who swims in the broad mainstream of American legal life – a description that Kagan easily satisfies – warrants deference from the Senate. Some

Democratic members of this Committee implicitly or expressly embrace this principle today but did not do so during the hearings for Justices Roberts and Alito. Some Republican members of this Committee implicitly or expressly embraced this principle during the hearings for Justices Roberts and Alito, but not today. The Democrats are right now and the Republicans were right then. But the opportunistic embrace of the principle, and the often-extremely-uncharitable characterization of the records of nominees of presidents of the opposite party, can only mean that neither side really believes in it. Such opportunism under the guise of principle is, with respect, worse than just regrettable; it damages the very judicial system the Committee is charged with nurturing and overseeing.

Miguel Estrada, a distinguished conservative lawyer who in my view was treated very unfairly by this Committee when he was nominated to serve on the federal bench, wrote to this Committee of Kagan: “If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we have reached a point where no capable person will readily accept a nomination for judicial service.” I completely agree. Elena Kagan is immensely qualified to serve on the Supreme Court. She should be easily confirmed.