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What Elena Kagan Could Have & Should Have Said (& Still Have Been Confirmed): A Reply

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WHAT ELENA KAGAN COULD HAVE AND SHOULD HAVE SAID (AND STILL HAVE BEEN CONFIRMED)

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MEMORANDUM FOR THE PRESIDENT OF THE UNITED STATES

From: Elena Kagan

Re: My Proposed Opening Statement for the Confirmation Hearing

Date: June 2010

Mr. President, below is the opening statement I plan on giving at my nomination hearing.

Good morning, Senator Leahy, Senator Sessions, and the rest of the Judiciary Committee. It is a great honor to be here and to be nominated as an Associate Justice of the United States Supreme Court. I am truly humbled by the proceedings today.

I have two obligations here this week. First, of course, I would like to make my President proud and be confirmed as an Associate Justice of the United States Supreme Court. Second, I would like to present to you and the American people a true and accurate picture of who I am and what I believe. Those two goals are not mutually inconsistent.

Before this process turns to your direct questions for me, I feel that it is important to explain and put into context some of the previous remarks I have made about this nomination process. These comments have generated controversy over the last several weeks, and I feel I should address them.[1] A few years ago, wearing an academic hat, I wrote that the process had become a "vapid and hollow charade," and that "repetition of

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* Professor of Law, Georgia State College of Law. This Commentary was presented at the Southeastern Association of Law Schools 2010 conference, and I appreciate the helpful comments I received during that conference.

1. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS (1994)).

platitudes ha[d] replaced discussion of viewpoints."[2] I concluded in that book review that the "hearings serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government."[3] I would like to try to put a dent in that cynicism today.

I will make three points at the outset, and then I will discuss each in more detail. First, I will answer your questions about my substantive views on specific constitutional questions fully, honestly, and directly. Second, I will offer a somewhat different view of the relationship between "law" and Supreme Court constitutional decisions than this committee has heard in the past. Third, I will explain why I think both the Senate and the American people deserve candor about my views on specific issues and are entitled to it in the future from all nominees to the highest Court in the land.

I have spent my professional life discussing, thinking, and writing about hard legal questions, and I cannot pretend otherwise. As you know, I am a former Dean of Harvard Law School and have spent considerable time practicing law for the United States Government. Were I invited to an academic symposium on free speech, abortion rights, affirmative action, or gay marriage, I would have predispositions on those and other difficult issues. If you ask me questions about how I currently view these topics, I will do my best to answer them. *I will not make any pledges or promises to decide any case in a specific way.* Moreover, I must admit that I do not know how I will approach these issues as a judge if I am lucky enough to receive the nomination. But, I do not approach controversial constitutional law questions with a blank slate, and you and the American people have a right to know how I think.

Some people believe that any disclosure of my views on specific questions would be inappropriate. I do not agree with that position. Let's take, as an example, perhaps one of the most controversial issues this country faces. Assume that after much thought and reflection, I were to believe that the Fourteenth Amendment protects, to a certain degree, a woman's right to terminate her pregnancy (I would remind the committee this is just a hypothetical). I might even say that at this moment I think the *Casey*[4] decision struck the right balance between the woman's right and society's interest in the life of the fetus and health of the mother. There is

2. *Id.* at 941.

3. *Id.*

4. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (holding that state and federal laws must not pose an "undue burden" on a woman's right to have an abortion) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

no difference between setting forth that view in a law review article I might have written last week or last year and saying it to you here today. When presented with a real case about abortion and when forced to make a decision as a judge, I might, of course, come out differently, but there would be nothing improper about me disclosing to you today the truth about how I view this difficult issue.

Ever since the Senate rejected Judge Bork, there has been the notion that nominees should not answer questions about their views on specific issues. And, candidly, I received that advice from many of my friends and colleagues before this hearing today. But I disagree. Judge Bork was not rejected because he answered questions truthfully. That is the wrong lesson to take from his confirmation process. He was rejected because, for better or worse, the Senate believed that his substantive views disqualified him from being a Justice. As I have written before, the hearings on Judge Bork "presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction."[5] The Senate and the public have the right to make that determination.

Senator Schumer, this is what you said during the confirmation hearings of Chief Justice Roberts, and it is as true today as it was then:

> It seems strange, I think, to the American people that you can't talk about decided cases, past cases, not future cases, when you have been nominated to the most important job in the Federal judiciary. You could do it when you worked in the White House. You could do it when you worked in the Justice Department. You could do it when you worked in private practice. You could do it when you gave speeches and lectures. As a sitting judge, you have done it until very recently. You could probably do it before you just walked into this hearing room. And if you are confirmed, you may be doing it for 30 years on the Supreme Court. But the only place and time that you cannot criticize any cases of the Supreme Court is in this hearing room when it is more important than at any other time that the American people and we, the Senators, understand your views.

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5. Kagan, *supra* note 1, at 941.

> Why this room should be some kind of a cone of silence is beyond me. The door outside this room does not say, "Check your views at the door."[6]

Senator Schumer, you were right then, and you would be right today to require me to answer such questions. In that vein, I look forward to a robust and profound conversation about the meaning of our Constitution and how it applies to specific cases.

The second point I want to talk about is related to the first in the sense that some have suggested that a nominee's personal views are largely irrelevant to the nomination hearings because it is the "law" that matters when the Court reaches decisions. Those who hold that view believe that a Justice's job is to apply the law to the facts before her and that a Justice's personal values and beliefs don't play a large role in the decision-making process.

In my role as an academic and as a lawyer, I have come to a different conclusion on these questions. Because of the vagueness of many of the important provisions of our Constitution, because history is often unclear, and because the Supreme Court has a clear practice of overturning important constitutional decisions, the "law" often runs out in difficult constitutional cases. At that point, a Justice has no choice but to bring her personal values, experiences, and judgments to the process. The law, alone, is simply not enough to decide these cases. *Let me be clear, however, that the fact that personal judgment matters is not the same thing as saying that I will legislate from the bench.* I will try to apply the law the best way that I can. But in constitutional cases, the law often leaves the Justices with significant discretion.

One way to illustrate this point is to rely on a hypothetical (after all, I am a former law professor) from my article on the nomination process to which I referred earlier. Imagine your response if President Obama had announced that he was going to choose his nominee to the Supreme Court by conducting a lottery among Richard Posner, Janet Reno, and Laurence Tribe because they seemed to him to be the nation's three smartest lawyers. Rather obviously, the implications for constitutional law of confirming each of them would be quite different, and that is not because they are, in some sense, "better or worse" than each other at legal interpretation. No, the differences that would emerge result not from

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6. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 375 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

varying legal skills but because those three people have different values and life experiences. Thus, it seems to me that you and the American people have the right to discover my values and my perspectives to the extent that they shape my views on specific constitutional questions, and I will be happy to share them with you.

Let me finish this last point by discussing the famous umpire analogy that Chief Justice Roberts used during his confirmation hearing. Here is exactly what he said:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.
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> Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.
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> . . . .
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> . . . I will remember that it's my job to call balls and strikes, and not to pitch or bat.[7]

Although this umpire analogy has been criticized by many in legal academia and the press, I think it can be helpful to a proper understanding of the role of the Court. Umpires, like Justices, are not at liberty to change the rules. Even if an umpire doesn't agree with the infield fly rule or the fact that after four balls the hitter gets to go to first base, he must nevertheless enforce those rules. Similarly, Supreme Court Justices are not at liberty to simply set aside constitutional rules they don't like. However, to suggest that individual discretion plays only a minor role in how an umpire or a judge does his job is to fail to illuminate these roles. An umpire has significant discretion, for example, to decide whether to eject from the game a manager or player who argues too much with a call, and an umpire's decision as to whether a particular pitch is a ball or strike is fraught with discretion and is unreviewable. Similarly, the decision as to whether a particular law violates the freedom of speech, whether a search

7. *Id.* at 55–56 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

is unreasonable, or whether a particular punishment is cruel and unusual also calls for the application of personal judgment and discretion. That is why brilliant judges like Justices Scalia and Ginsburg disagree over major constitutional questions. On gun control, abortion, affirmative action, campaign finance reform, and the separation of church and state, these two Justices come to different conclusions. That disagreement results much more from their different perspectives, values, and life experiences than a difference in legal or interpretive skills.

For all of these reasons, if you ask me questions about my values, my perspectives, and my life experiences as they relate to the job I am being nominated to perform, I will answer them honestly, directly, and to the best of my abilities.

Finally, I would like to offer a few thoughts to those of you who are concerned that my perspective on this nomination process and the Court poses a threat to you should you vote to confirm me. I believe the American people understand that the job of being a Supreme Court Justice requires more than legal skills, and they understand very well that difficult constitutional questions cannot be answered by simply applying clear law to undisputed facts. They know that judges are not computers who can come up with objectively right answers. I believe that the legal commentators for CNN, Fox News, MSNBC, and the networks also understand this very well. You and your constituencies may disagree with me on specific legal questions, and if you disagree with me enough, perhaps you should vote against my confirmation. But I sincerely believe that no one will hold against me the fact that I will tell the truth about my views and that I will be candid as to what issues I have strong feelings about and which issues I do not have strong feelings about. As I wrote fifteen years ago:

> [T]he Senate's confirmation hearings[] ought to focus on substantive issues; the Senate ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. Like other kinds of legislative fact-finding, this inquiry serves both to educate members of the Senate and public and to enhance their ability to make reasoned choices. Open exploration of the nominee's substantive views, that is, enables senators and their constituents to engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires. These are the issues of greatest consequence

> surrounding any Supreme Court nomination (not the objective qualifications of the nominee); and the process used in the Senate to serve the intertwined aims of education and evaluation ought to reflect what most greatly matters.[8]

So, to conclude my remarks, let me say that I promise to bring an open mind to all the cases before me. I will never decide a case because of the identity of the parties or any relationship I have with any of the parties, and I will do my best to ascertain the relevant law in every case. But, to pretend that I do not hold views on the disputed constitutional issues of our day, or that those views will be irrelevant to my decision making, or that the United States Senate and the American people are not entitled to an understanding of those views, is something I simply cannot do. I truly hope that belief does not disqualify me from being an Associate Justice of the United States Supreme Court.

Thank you very much.

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8. Kagan, *supra* note 1, at 935.