ELENA KAGAN CAN'T SAY THAT: THE SORRY STATE OF PUBLIC DISCOURSE REGARDING CONSTITUTIONAL INTERPRETATION

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MEMORANDUM FOR THE PRESIDENT OF THE UNITED STATES

From: Ray L. Politik, Counsel to the President

Re: Proposed Statement of Elena Kagan to the U.S. Senate, Committee on the Judiciary, on her nomination to be an Associate Justice of the Supreme Court of the United States

Date: June 2010

I have reviewed the draft statement that Elena Kagan has proposed submitting to the Senate Judiciary Committee.[1] In this statement, Dean Kagan seeks to educate the Judiciary Committee and the American people to think differently about the enterprise of constitutional interpretation. This is a highly quixotic mission with very little chance of success and tremendous potential to do damage to you and to the judiciary. It is, therefore, my recommendation that you urge Elena Kagan, in the strongest terms possible, not to submit the proposed statement.[2] If this effort at persuasion fails, I recommend that you withdraw her nomination.

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* Professor of Law, Georgia State University College of Law. From 2009–2010, I worked in the Department of Justice as Counselor to the Assistant Attorney General for the Office of Legal Policy. The views expressed in this Commentary do not express the views of the Department of Justice or the administration. Moreover, nothing expressed in this Commentary reflects nonpublic or other "inside" information.

1. Eric J. Segall, *What Elena Kagan Could Have and Should Have Said (and Still Have Been Confirmed)*, 88 WASH. U. L. REV. 535 (2010).

2. I do not mean to suggest, of course, that Dean Kagan make any statement she believes to be untrue. I do believe she can honestly make a statement such as that given by Justice Sotomayor during her confirmation hearing:

> In the past month, many Senators have asked me about my judicial philosophy. Simple: fidelity to the law. The task of a judge is not to make law. It is to apply the law.
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> . . . That is why I generally structure my opinions by setting out what the law requires and then explaining why a contrary position, sympathetic or not, is accepted or rejected.

Dean Kagan proposes to declare that "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."[3] I want to make it clear at the outset that I do not, in this memo, take issue with the substance of this view.[4] My objections are, rather, strategic. In short, Dean Kagan's confirmation hearing is neither the time nor the place to challenge the prevailing notion of how judges should interpret the Constitution.

The conservative legal movement[5] has succeeded in planting in the minds of much of the American public the idea that there are two types of judges: the liberal, activist judge and the conservative judge. Conservative judges promise to interpret the Constitution according to its text and the original understanding of that text, and without reference to values, experience, or other considerations that are external to the Constitution's text as originally understood.[6] Liberal, activist judges, by contrast, are said to interpret the Constitution according to their own values and experiences in order to "do justice" in the cases they decide. The conservative

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> That is how I seek to strengthen both the rule of law and faith in the impartiality of our judicial system. My personal and professional experiences help me to listen and understand, with the law always commanding the result in every case.

Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. 59 (2009) (statement of Sonia Sotomayor, Nominee to be an Associate Justice of the Supreme Court of the United States).

3. Segall, *supra* note 1.

4. I also do not mean to endorse Dean Kagan's position. While I agree that the Constitution's text is frequently indeterminate as applied to contemporary controversies, I believe that such controversies are best resolved by reference to the values embodied within the Constitution itself, rather than by reference to a Justice's own personal values. It is true that the Constitution encompasses a range of values that are frequently in tension—national security and individual liberty, for example. Yet, I believe that the best construction of constitutional meaning lies in the balancing of these constitutional values according to accepted modes of judicial interpretation; here, I mean something roughly like the modalities set forth in Philip Bobbitt's important book, *Constitutional Fate*. For an excellent survey of these modalities as actually employed in Supreme Court constitutional interpretation, see LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION (2009). An individual Justice's personal values and life experiences may have some relevance to the Justice's actual practice of accommodating competing and conflicting constitutional values, but, for the reasons set forth in the balance of this memo, I believe that discussing this topic is, at least, distracting.

5. I refer to the movement described in STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

6. There are, of course, many differing approaches to originalism, but these differences are of no significance to resolving the matter at hand. I should also note that many originalists are willing to concede that a judge must also take account of judicial precedent in construing the Constitution and that, on occasion, precedent may require the judge to adhere to an interpretation that is at odds with original understanding.

approach is taken to be legitimate because it maintains the neutrality of the interpreter and prevents the judge from imposing his or her own policy preferences. The liberal, activist approach is understood to be illegitimate because it releases the objective constraints (the text and original understanding) that prevent a judge from altering the meaning of the Constitution. Thus, liberal, activist judges are frequently derided as "legislating from the bench."

The conservative model of what a judge is supposed to do when interpreting the Constitution was famously stated by Chief Justice John Roberts in his opening statement at his own confirmation hearing:

> 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.[7]

Even though this formulation had tremendous public appeal, it does not tell us very much about what it means for a judge to call balls and strikes. In fact, it didn't need to. That job—setting forth the substance of the proper, nonactivist method of constitutional interpretation—had been done already by numerous commentators. Robert Bork has written several books since his own failed nomination to the Supreme Court explaining the enterprise. Mark Levin, the conservative talk-show host and writer on legal issues, sums up Bork's work thusly:

> originalism "appeal[s] to a common sense of what judges' roles ought to be in a properly functioning constitutional democracy. Judges are not to overturn the will of legislative majorities absent a violation of a constitutional right, as those rights were understood by the framers. . . . Originalism seeks to promote the rule of law by imparting to the Constitution a fixed, continuous, and predictable meaning."[8]

Former Justice David Souter has recently attempted to expose the myth at the heart of this dichotomy between conservative and activist judges. In

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7. *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. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

8. MARK LEVIN, MEN IN BLACK 13 (2005) (quoting John E. Thompson, Note, *What's the Big Deal: The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 581 (2003)).

his commencement address at Harvard University, he offered an extraordinarily subtle and thoughtful critique of the judge-as-umpire model and an equally compelling case for values-based judging. His effort is worth an extended excerpt:

> The [umpire][9] model fails to account for what the Constitution actually says, and it fails just as badly to understand what judges have no choice but to do. The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all conflicts, and no resolutions [sic] immune to rethinking when the significance of old facts may have changed in the changing world. These are reasons enough to show how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments. Judges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning.
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> So, it is tempting to dismiss the critical rhetoric of lawmaking and activism as simply a rejection of too many of the hopes we profess to share as the American people. But there is one thing more. I have to believe that something deeper is involved, and that behind most dreams of a simpler Constitution there lies a basic human hunger for the certainty and control that the [umpire] model seems to promise.
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> . . . .

9. Justice Souter uses the phrase "fair reading model" to refer to the judge-as-umpire approach. I believe that is a more accurate description even than originalism. Justice Scalia's important articulation of the model makes it clear that his method is actually best described as textualism rather than originalism, which is consistent with Justice Souter's label. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). Nevertheless, the tag "originalism" has taken hold in public discourse, and even Justice Scalia does not attempt to revise this.

> But I have come to understand . . . that I differ from the critics I've described . . . . Where I suspect we differ most fundamentally is in my belief that in an indeterminate world I cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future. And to me, the future of the Constitution as the Framers wrote it can be staked only upon that same trust.[10]

This is nearly identical to the argument Dean Kagan proposes to make in her draft statement. While the publicity of Justice Souter's speech did not approach the publicity attending a Supreme Court confirmation hearing, the speech was very widely publicized. The reaction to Justice Souter's speech is not an encouraging precedent for Dean Kagan's proposal. For example, the *Boston Globe*'s story covering the speech was headlined, "Souter Defends Judicial Activism; Says Perspectives Change with Time."[11]

Justice Stephen Breyer has just published a book, *Making Our Democracy Work*, which follows his 2005 book, *Active Liberty*, and continues his project of explaining and justifying the role of the judiciary in our constitutional system. The review published in *The New York Times*, by a former aide to President Clinton who is sympathetic to Breyer's project, notes that the book arrives "at a time when legal thinkers on the left are struggling to develop a jurisprudence with anything like the clarity (or, rather, the certainty) of that on the right."[12]

Perhaps most directly on point, you have nominated Professor Goodwin Liu to be a judge on the United States Court of Appeals for the Ninth Circuit. Professor Liu is exceptionally well qualified and has a compelling life story. Senate Republicans, however, have been blocking his nomination on the grounds that he will be an activist. Their evidence? A book[13] he co-wrote espousing an approach to constitutional interpretation that conservatives claim is not originalist.[14] The views that

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10. Justice David H. Souter, *Text of Justice Souter's Speech: Harvard Commencement Remarks (As Delivered)*, HARVARD GAZETTE, May 27, 2010, http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/.

11. Jonathan Saltzman, *Souter Defends Judicial Activism; Says Perspectives Change with Time*, BOS. GLOBE, May 28, 2010, at 4, *available at* www.boston.com/news/local/massachusetts/articles/2010/05/28/souter_defends_judicial_activism/. Of course, Justice Souter said nothing of the sort.

12. Jeff Shesol, *Evolving Circumstances, Enduring Values*, N.Y. TIMES, Sept. 19, 2010, at BR14, *available at* http://www.nytimes.com/2010/09/19/books/review/Shesol-t.html.

13. GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2009).

14. *See, e.g.*, Shannon Bream, *Obama 9th Circuit Nominee: Constitution Must Adapt to Changes in the World*, FOXNEWS.COM, Mar. 4, 2010, http://www.foxnews.com/politics/2010/03/04/obama-th-

Liu and his coauthors set forth are similar to those expressed by Justices Souter and Breyer and, if anything, milder than those in Dean Kagan's draft statement. Predictably, Republicans claim that "Liu believes that judges have the authority to impose their views . . . using clever verbal camouflage to disguise what they're doing."[15] Professor Liu's nomination remains stalled and was returned to the White House without action at the Senate's last recess.

These examples, chosen from among legions available, demonstrate that the conservatives have succeeded in defining the debate: a judge is either a judicial activist or a conservative. If Dean Kagan gives the proposed remarks, she will clearly brand herself a judicial activist, just as Justice Souter did in his Harvard commencement address. This will open her to demagoguery by conservatives on the Judiciary Committee and by right-wing media commentators and bloggers. This, in turn, will seriously jeopardize her prospects for confirmation.

Dean Kagan is, I believe, well aware of this common misconception regarding "judicial activism." Her proposal, then, seems bottomed on the perception that her confirmation hearing could provide a "teachable moment," after which the public understanding of constitutional interpretation will change in some important respect. Even though Dean Kagan is a magnificent teacher, this project is doomed to fail because confirmation hearings are not teachable moments.

I know you are familiar with the confirmation battle waged over the nomination of Robert Bork to the Supreme Court. Tremendous attention—I would say unprecedented attention—was given to his theory of constitutional interpretation and its potential consequences for the country. If ever a Supreme Court nomination provided the nation a teachable moment, it was Robert Bork's. After this full airing of views, Judge Bork's nomination was rejected by a bipartisan vote. The lesson of this teachable moment should have been that originalism is not a credible method of constitutional interpretation. Yet, the lure of originalism and its false promise of objective, neutral judging has grown stronger since that event.

Public understanding of the Constitution's meaning and the role of interpretation forms gradually over time, rather than in a galvanizing

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circuit-nominee-constitution-adapt-changes-world/ (noting that opposition to his writings focuses on his book on constitutional interpretation).

15. *Id.* (quoting Ed Whelan, a leading conservative pundit on legal issues and president of the Ethics and Public Policy Center).

teachable moment. As an example, take *Brown v. Board of Education*.[16] *Brown* itself was the culmination of decades of strategizing by Charles Hamilton Houston, the NAACP, and other thinkers and organizations, carried into execution by Thurgood Marshall and a team of lawyers in a painstaking series of cases designed to pave the way for the overruling of *Plessy v. Ferguson*'s[17] doctrine of "separate but equal." Once decided, *Brown* actually did little to engender racial equality,[18] but it provided strong moral and rhetorical force for the civil rights movement. It enabled Dr. Martin Luther King, Jr., to declare, "If we are wrong, then the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong."[19] It was another decade before Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to establish the principle of nondiscrimination in American law.

More to the point, the conservative legal movement that has convinced the public that its method of interpretation is legitimate and that other methods are activist did not succeed overnight. Rather, it had its roots in the opposition to *Brown*, which gave rise to the Southern strategy of Richard Nixon, including his railing against liberal, activist judges. The movement was later advanced through the founding and impressive work of the Federalist Society and the broad network of conservative legal scholars and practitioners that it fostered.[20] When John Roberts pitched his umpire metaphor, it represented a culmination, rather than an origination, for the conservative legal movement. As noted above, the umpire metaphor was forceful, not because then-Judge Roberts used his hearing as a teachable moment, but because of the tremendous amount of prior spade work that had been done to make the public receptive to his sloganeering.

We have no similar public support, nor do we have a significant constituency that demands that we seek to promote a progressive legal agenda. Consider two contrasting examples. The Heritage Foundation, in 2005, published *Mandate for Leadership*, which conservatives hoped would be a blueprint for George W. Bush's second term. Former attorney general Edwin Meese coauthored a chapter entitled, "Restoring the Proper

16. 347 U.S. 483 (1954).

17. 163 U.S. 537 (1896).

18. *See generally* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

19. *See* Martin Luther King, Jr., Speech at the Holt Street Baptist Church (Dec. 5, 1955), *available at* http://www.blackvoices.com/black_news/canvas_directory_headlines_features/feature_article?id=20060111182609990001.

20. For an outstanding exploration of this phenomenon, see TELES, *supra* note 5.

Role of the Courts." In this chapter, he asserted that the rule of law means that "the U.S. Constitution and laws are supreme and have fixed, objective meanings . . . . The Constitution is very much alive and relevant to protecting our freedoms today, but it does not vary in its meaning or protections depending on the fashionable trends or notions of any era."[21] After setting forth this "principle," Mr. Meese sets out the operational objective to carry this principle into effect: "Nominate and confirm to federal courts only individuals who have a proven record of fidelity to the Constitution, the rule of law, and the proper role of a federal judge."[22] He goes on to explain this objective:

> The President and Senators should conduct a careful inquiry into a potential federal judge's judicial philosophy, or the methodology he would use when deciding cases. It is not enough for a nominee simply to pledge to follow the rule of law without explaining what that means. A record of scholarship, prior opinions, or a discussion of important constitutional provisions should be pursued to determine whether the nominee appreciates what the rule of law requires, which includes a commitment to interpret and apply the Constitution and laws as they were written and were originally intended to operate.[23]

In 2008, by contrast, the Center for American Progress—the progressive version of the Heritage Foundation—published a book that was intended as a blueprint for the next presidential term.[24] It did not include an entry on judicial appointments or the role of the judiciary. This was not an oversight.[25] Rather, it reflects the absence of a significant constituency demanding a progressive approach to constitutional issues. Until such a constituency forms, it would be foolish to spend political capital on a Supreme Court nomination fight. In the absence of such a

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21. Edwin Meese III & Todd F. Gaziano, *Restoring the Proper Role of the Courts*, *in* HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: PRINCIPLES TO LIMIT GOVERNMENT, EXPAND FREEDOM, AND STRENGTHEN AMERICA 17, 18 (2005).

22. *Id.* at 19.

23. *Id.*

24. *See* CHANGE FOR AMERICA: A PROGRESSIVE BLUEPRINT FOR THE 44TH PRESIDENT (Mark Green & Michelle Jolin eds., 2008).

25. The Center for American Progress published a paper on judicial appointments on its website along with papers on a variety of other subjects that did not make the cut for inclusion in the published book. *See* SIMON LAZARUS, CTR. FOR AM. PROGRESS ACTION FUND, JUDICIAL NOMINATIONS: IMPLEMENTING THE RULE OF LAW (2005), http://www.americanprogressaction.org/issues/2008/changeforamerica/pdf/judicial1.pdf.

constituency, a Supreme Court confirmation battle will yield no benefit to your administration.

Finally, allowing Dean Kagan to proceed with her draft statement would be contrary to the consistent policy of this administration.[26] To date, we have refused to spend any political capital on judicial nominees, or any other nominees for that matter. The reason for this policy is simple: this administration has too many important matters to contend with to be distracted by personnel matters. Indeed, spending political capital on nominations diminishes the store of capital available for this administration to pursue the historically important reforms that you were elected to achieve. The list, as you know better than anyone, is extensive. The highlights include reforming health care, enacting an economic stimulus to respond to the gravest economic crisis in seventy years, reforming the banking and financial sector, responding to climate change, fighting the war on terror, prosecuting two wars simultaneously, responding to the perceived immigration crisis, containing the oil leak in the Gulf of Mexico, and promoting energy security.

These problems demand near-term action, and the American people elected you to provide leadership in resolving them; they did not elect you to supply them with the breads and circuses of the culture wars. This is why we immediately retreated from using the term "empathy" when doing so became so controversial in the context of the last Supreme Court nomination, that of Justice Sonia Sotomayor.[27] Even if Dean Kagan is

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26. Author's note: I have gleaned the administration's policy from its actions and not from any information gained while I was in government service.

27. For an example of the backlash that the use of this word generated, see Karl Rove, *"Empathy" Is Code for Judicial Activism,* WALL ST. J., May 28, 2009, at A13, *available at* http://online.wsj.com/article/SB124347199490860831.html. Each of the Republican senators on the Judiciary Committee took issue with the legitimacy of employing empathy in judging during his opening remarks on the confirmation hearing of Justice Sotomayor. The comments of the Ranking Member, Senator Sessions, are emblematic:

> I have to say, as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy," as well as, his word, "their broader vision of what America should be."
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> Like the American people, I have watched this process for a number of years, and I fear that this "empathy standard" is another step down the road to a liberal activist, results-oriented, and relativistic world where laws lose their fixed meaning, unelected judges set policy, Americans are seen as members of separate groups rather than as simply Americans, and where the constitutional limits on Government power are ignored when politicians want to buy out private companies. So we have reached a fork in the road, I think, and there are stark differences.
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> I want to be clear:

willing to supply her cause (a cause that does not appear to have many followers) with a martyr on the example of Robert Bork, your agenda is too important to allow her to do so.

I do not wish to suggest that you simply cede the battle to the conservatives. Instead, I suggest that you begin to explore ways that your administration might begin to promote the sort of grassroots constituency that is an indispensable precondition for creating a progressive constitutional agenda. There are groups, such as the American Constitution Society and the Alliance for Justice, that are actively engaged in these issues. They do excellent work, but there may be ways that we can help them. If so, this could prove to be an important part of your legacy as President.

> I will not vote for—and no senator should vote for—an individual nominated by any President who is not fully committed to fairness and impartiality toward every person who appears before them.
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> I will not vote for—and no Senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court.

Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. 6–7 (2009) (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary).