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

A REPLY

ERIC J. SEGALL[*]

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, your counsel has urged you[1] to persuade me to either change the draft opening statement[2] I previously sent to you or withdraw my nomination. I respectfully encourage you to do neither.

Although counsel does not take direct issue with the substance of my draft statement, he believes that my remarks would lead to a nomination battle that either we would not win or would distract the administration from more important matters such as health care, the economy, and our national security. With all due respect, he is wrong on both counts.

First, my opening remarks simply state the relatively obvious and well-accepted idea that Supreme Court constitutional cases require that the Justices exercise significant discretion when reaching appropriate outcomes. Virtually all constitutional law professors, media commentators, and even the senators themselves already agree with that proposition. The only apparent place this truth can't be uttered is in the Senate Judiciary Committee. We should welcome the Republican senator who wants to argue that Supreme Court Justices decide these cases like computers, where human judgment is unnecessary. My statement makes

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1. Neil J. Kinkopf, *Elena Kagan Can't Say That: The Sorry State of Public Discourse Regarding Constitutional Interpretation*, 88 WASH. U. L. REV. 543 (2010).

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

clear that the existence of discretion on issues like gun control, abortion, and campaign finance reform does not equate with "legislating from the bench." If we were to have this argument over how the Supreme Court actually decides these cases, I promise the opposition will look naïve and silly.

Counsel is concerned that the Republican Party has convinced all of America that there are only two kinds of Justices: liberal (Democratic) judicial activists and conservative (Republican) Justices who exercise appropriate self-restraint. I agree that the Republicans have so far won this argument, and that is one of the reasons we have had such a difficult time pushing our nominees through the Senate. It is well past time to change this dynamic, and the best place to start is a nomination hearing broadcast on national television. I can make a persuasive case that the conservative wing of the Court has been invalidating state and federal laws and overturning precedent at a rate that demonstrates that the left has no monopoly on judicial activism. Furthermore, I will persuasively argue (in a manner laypeople can understand) that this entire debate over activist judging is a red herring because the real issue is whether the American people agree or disagree with specific decisions, not whether those decisions were issued by "activist judges." I feel confident that, with our side controlling the procedures of the hearing, I will make this case much more persuasively and effectively than the opposition. Let's try to finally put the misleading and contentious debate over judicial activism to bed.

Mr. President, I urge you to allow me to counter the propaganda with which our opposition has been bombarding the American people since the Bork nomination. Unlike Judge Bork, my substantive views, as you know, are quite centrist, and, unlike Judge Bork, I come to this process with a reputation for moderation and reaching out to those across the aisle (demonstrated by the fact that several prominent conservatives such as Miguel Estrada have endorsed my nomination). Simply put, by the time I am done testifying, my remarks and answers to questions will demonstrate that I am a middle-of-the-road nominee trying to put some reality back into what everyone agrees is a broken process. Any senator who votes against me after this testimony will vote against me regardless of what I say; only now, they will look like someone trying to hide the truth.

Counsel is also concerned that my remarks will spark a bitter nomination fight that will impede the administration's efforts in other areas. The truth is that, at most, my nomination will be a major news story for only a couple of weeks. In addition, to the extent that the process receives significant media attention, it gives all of us an opportunity to make the point that the conservatives on the Court have ruled over and

over again in favor of business and Wall Street interests and against the American people. I believe my testimony would play well on "Main Streets" all across the land, and we should welcome *that* kind of distraction.

Finally, Mr. President, when I testify in front of the Judiciary Committee, I am going to take an oath to tell the truth. You know as well as anyone that the Supreme Court does more than apply clear law to undisputed facts when deciding constitutional law cases. You also know that one's life experiences and values are crucial to how he or she will resolve difficult legal questions. How can I tell the truth and testify otherwise? I can't help but feel that we have an obligation to change this nomination process from a misleading and mind-numbing farce to a respectable and transparent component of our democratic system of self-government. That change alone will be well worth the fight.