



# AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

**STATEMENT**

**OF**

**KIM J. ASKEW**

**STANDING COMMITTEE ON THE FEDERAL JUDICIARY  
AMERICAN BAR ASSOCIATION**

**concerning the**

**NOMINATION**

**of**

**THE HONORABLE ELENA KAGAN**

**to be**

**ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES**

**before the**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**JULY 1, 2010**

Mr. Chairman and Members of the Committee:

My name is Kim J. Askew of Dallas, Texas, and it is my privilege to chair the American Bar Association's Standing Committee on the Federal Judiciary. I am joined today by William J. Kayatta, Jr. of Maine, our First Circuit representative and the lead evaluator on the Standing Committee's investigation of the Honorable Elena Kagan. We are honored to appear here today to explain the Standing Committee's evaluation of the professional qualifications of Solicitor General Kagan to be Associate Justice of the Supreme Court of the United States.

President Obama announced his nomination of Solicitor General Elena Kagan to be Associate Justice on May 10, 2010. The Standing Committee began its evaluation that very day and continued its work for the next several weeks. The Standing Committee unanimously concluded that General Kagan merits our highest rating and is "Well Qualified" for appointment to the Supreme Court of the United States.

### **THE STANDING COMMITTEE'S EVALUATION PROCESS**

The Standing Committee has conducted its independent and comprehensive evaluations of the professional qualifications of nominees to the federal bench since 1948. The fifteen distinguished lawyers who make up our Committee come from every federal circuit in the United States. These lawyers each spend between 500 and 1,000 hours per year without compensation conducting the nonpartisan peer reviews of the professional qualifications of all nominees to the Supreme Court of the United States and all federal district and lower appellate courts, as well as the Court of International Trade and the Article IV territorial district courts.

The Standing Committee does not propose, endorse, or recommend nominees. Its sole function is to evaluate a nominee's integrity, professional competence, and judicial temperament, and then rate the nominee either "Well Qualified," "Qualified," or "Not Qualified." In so doing,

the Committee relies heavily on the confidential, frank, and considered assessments of lawyers, academics, judges, and others who have relevant information about the nominee's professional qualifications.

The Standing Committee's investigation of a nominee to the Supreme Court of the United States is based upon the premise that the nominee must possess exceptional professional qualifications. As set forth in the ABA's *Backgrounder*:

To merit the Committee's rating of "Well Qualified," a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence and judicial temperament. The rating of "Well Qualified" is reserved for those found to merit the Committee's strongest affirmative endorsement.<sup>1</sup>

The significance, range, complexity, and nation-wide impact of issues that such a nominee will confront on the Supreme Court demands no less. As such, our investigation of a Supreme Court nominee is more extensive than nominations to the lower federal courts, and procedurally different in two principal ways.

First, Standing Committee members conduct investigations into the nominee's professional qualifications in every federal circuit in the United States, not only in the resident circuit of the nominee. In accord with our procedures, each Standing Committee member prepared a confidential circuit report, which is included in the comprehensive confidential final report on which the Standing Committee bases its rating.

Second, the Standing Committee commissioned three Reading Groups of scholars and practitioners to review the nominee's legal writings and supplement the Standing Committee's own review of the nominee's writings. Georgetown University Law Center and Washington University in St. Louis School of Law each formed Reading Groups composed of a total of

---

<sup>1</sup> American Bar Association, *Standing Committee on the Federal Judiciary What it is and How it Works* ("*Backgrounder*") at p. 10.

twenty-nine professors who are recognized experts in the substantive areas of law they reviewed. Collectively, these professors have decades of experience not only in teaching and scholarship, but also in law firms, non profit organizations, and state and federal government.

The Practitioners' Group is composed of nationally recognized lawyers with substantial trial and appellate practices. All of the readers are knowledgeable of Supreme Court practice, and most have briefed and argued cases in the Supreme Court or in the highest state appellate courts or are former law clerks to Justices on the Supreme Court. The Reading Groups are guided by the same standards that are applied by the Standing Committee and independently evaluate the nominee's analytical ability, clarity, knowledge of the law, application of the facts to the law, and ability to communicate effectively. Each member of each group reduces his or her evaluation to writing, with cited examples, and those written evaluations are then provided to each member of the Standing Committee.

In undertaking its extensive investigation of the professional qualifications of General Kagan, the Standing Committee wrote to invite input relevant to our investigation from 2,453 persons, including all federal district and appellate judges, as well as magistrate judges, Justices of the Supreme Court of the United States, many state judges, lawyers, and community and bar representatives. The Standing Committee solicited input from the lawyers, judges, and additional individuals identified by General Kagan in her Personal Data Questionnaire submitted to this Committee as possibly having knowledge of her professional qualifications. The Standing Committee identified other persons with such knowledge through interviews with lawyers and judges and a review of General Kagan's writings. We interviewed many who had worked with and against General Kagan in her capacity as Solicitor General, and others who had personally witnessed her oral arguments or read transcripts of those arguments. We interviewed law school

deans and law professors at Harvard, the University of Chicago, and elsewhere, who were familiar with General Kagan's scholarship, her work as a law professor, and her service as Dean of the Harvard Law School. We also interviewed Article III judges at each level of the federal judiciary, and lawyers who had worked with her in private practice and at the White House.

We also gathered and reviewed General Kagan's major writings. To facilitate the Standing Committee's review of her writings, an intranet site was established containing all of the nominee's writings that were publicly available, including her law review articles, speeches, briefs filed in cases she handled as an associate, written materials such as letters and emails generated while Dean of Harvard Law School, transcripts of her oral arguments as Solicitor General, and briefs filed by the Office of the Solicitor General under her leadership. Certain materials released by the Clinton Administration were reviewed. The Standing Committee also considered its confidential evaluation conducted in 1999 when General Kagan was nominated to the United States Court of Appeals for the District of Columbia.<sup>2</sup>

The Standing Committee followed General Kagan's career at the University of Chicago and Harvard Law School, and in Washington, interviewing lawyers, professors, staff, and colleagues, in each case specifically searching for all views, negative or positive, regarding her professional qualifications for service on the Supreme Court.

The Standing Committee based its evaluation on these interviews with judges, lawyers, law professors and community representatives from across the United States; on its own reading of the nominee's major writings; on reports of the three Reading Groups; and on an in-depth personal interview of the nominee that was conducted by our lead investigator, First Circuit representative William J. Kayatta, Jr., and Chair Askew on June 13, 2010. Each member of the

---

<sup>2</sup> In connection with the 1999 evaluation, a substantial majority of the Standing Committee found her "Qualified" for service and a minority rated her "Well Qualified."

Standing Committee reviewed the confidential final report and individually evaluated the nominee's professional qualifications by assessing her integrity, professional competence, and temperament. The Standing Committee unanimously concluded<sup>3</sup> that General Kagan was "Well Qualified" to be Associate Justice of the United States.

### **OUR EVALUATION OF GENERAL KAGAN'S PROFESSIONAL QUALIFICATIONS**

The Standing Committee did not base its rating on, or seek to express any view regarding General Kagan's ideology, political views or political affiliation. It also did not solicit information with regard to how General Kagan might vote on specific issues or cases that might come before the Supreme Court of the United States. Rather, the Standing Committee's evaluation of General Kagan is based solely on a comprehensive, nonpartisan, nonideological peer review of the nominee's integrity, professional competence, and judicial temperament.

#### **1. Integrity**

In evaluating integrity, the Standing Committee considers the nominee's character and general reputation in the legal community, as well as the nominee's industry and diligence.<sup>4</sup> The Committee also considers the extent to which there have been any findings of ethical violations or the like by a nominee, of which there have been none relating to General Kagan. She has earned and enjoys an excellent reputation for integrity and outstanding character.

Lawyers and judges uniformly praised the nominee's integrity. We cite a few representative comments as follows:

"He believes her professional demeanor is excellent and that she has the highest reputation for integrity. He would give her the highest possible rating to be on the U.S. Supreme Court."

---

<sup>3</sup> One member of the Standing Committee did not vote because she is a partner at the firm in which the nominee previously worked several years ago.

<sup>4</sup> *Backgrounder* at 3.

\* \* \*

“Her integrity is of the highest order.”

\* \* \*

“He has no qualms about her integrity. ‘She is a paragon of virtue.’”

\* \* \*

“There are no integrity issues. She is fair-minded and never played games.”

\* \* \*

“He would rate her Well-Qualified Plus!”

\* \* \*

“There is no integrity issue. She is ‘straightforward’ and terrific.”

\* \* \*

“Judge [ ] knows her well and says that her temperament is excellent. She is revered by her students. He has a law clerk who served in Iraq and Afghanistan who wrote a letter in support of Dean Kagan and her position on the military. He says she is very sensitive to these issues and she treated the military students very well. He gives her integrity an A plus.”

\* \* \*

“There are no integrity or character issues. The Government never took positions that weren’t addressed with the parties; her statements during the meetings were clear, accurate and truthful. He rates her ‘Well Qualified.’ She is ‘about as good as it gets.’”

\* \* \*

“There are no integrity or character issues. From his personal experience and from what he has heard, she has the highest integrity, forthrightness and honesty.”

\* \* \*

“Her integrity is impeccable. There is simply no question of her integrity.”

\* \* \*

“Her integrity is ‘her strongest quality.’ She ‘tells it as it is, even when it is unpleasant to do so.’ She told [her boss] he could not do certain things he wanted to do because they were not supported by law. She does not flinch in the face of power.”

\* \* \*

“Her integrity is top-notch. The Solicitor’s General’s office has a strong tradition of wanting the Supreme Court to be certain of its accuracy of information and reliability in the law. She has continued that tradition.”

\* \* \*

The nominee’s handling of military recruiters at Harvard Law School was raised in the media as a possible basis for criticizing the integrity of the nominee for allegedly treating military recruiters and students interested in the military as second class citizens. Harvard Law School had a long-standing policy denying placement office services to any firm or organization that refused to hire students for reasons including known sexual orientation. She enforced the policy. She did so less forcefully with the military than many in the Law School wished, setting up an alternative channel to provide similar services through a veterans group, and then exempting the military from enforcement of the policy when required to do so in response to the threatened loss of all federal funding for the entire university. In other words, she provided military recruiters with a degree of student access that likely would not have been provided to private employers with similar policies. Our interviews and review of these facts disclosed no evidence that then Dean Kagan demonstrated any type of bias that would cause us to question her integrity under our standards.

On the basis of the foregoing comments and our extensive review as described above, the Standing Committee concluded that General Kagan possesses the integrity required to receive a “Well Qualified” rating.

## 2. Professional Competence

“Professional competence” encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience. A Supreme Court nominee must possess “exceptional professional qualifications,” including an especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence. The nominee must be able to write clearly and persuasively, harmonize a body of law, apply the law to the facts, and give meaningful guidance to the trial and circuit courts and the bar.<sup>5</sup> General Kagan’s professional competence is exceptional.

In summarizing the basis for this conclusion, we emphasize that the Committee does not simply express its own view. Rather, as a conduit for the views of the nominee’s peers in our profession, it also expresses the nearly unanimous consensus of the judges, lawyers, academics, and government officials whom we interviewed. This point merits repeating: almost all of the experienced, dedicated, and knowledgeable sitting judges, former solicitor generals from both parties, legal scholars from top law schools across the country, and lawyers who have worked with or against the nominee in government or court describe the nominee as outstanding in all respects and cite specific evidence in support of that view.

Many described her professional competence as “exceptional,” “extraordinary,” “very high,” and “as good as it gets.” Specific comments from a wide array of lawyers and judges include:

“Her legal skills are ‘remarkable and brilliant, and her analytical skills are balanced., She is a gifted writer.’ Her writing displays a respect for judges and ‘she keeps her points narrow and minimalist, not setting policy, which is the way I think a judge should write.’”

\* \* \*

---

<sup>5</sup> *Backgrounder* at 9.

“She is ‘extraordinarily bright, not in a theoretical way.’ She has the ability to ‘deal with issues in a practical and real way.’ . . . She had the ability to quickly comprehend many of the issues and to understand the statutory, legal and litigation aspects that would be impacted. Kagan has a broad knowledge of the jurisprudence coupled with a practical knowledge of the law. She has an ‘innate knowledge of the litigation process and understands how legal arguments translate from the courtroom.’”

\* \* \*

“Elena is very capable at ‘at the highest level.’ . . . She organizes her thinking in a ‘superior way, super smart and very articulate.’”

\* \* \*

“Her analytical ability was excellent and ‘as good as he has ever seen.’ She knew what was important and what was not, and she was ‘smart and logical.’”

\* \* \*

“Elena is ‘exceptionally competent,’ ‘was one of the brightest and best.’ . . . She was rated a ‘10 out of 10 and a star.’ You had total confidence in her work.”

\* \* \*

“She is an extremely gifted and an exceptionally bright and thoughtful lawyer. “

\* \* \*

“She was ‘a real superstar, an excellent writer, a good thinker and a good strategist.’ . . . Her analytical ability was at the ‘highest order’ and ‘beyond her years.’”

Given the breadth, diversity, and strength of this and similar feedback from judges and lawyers of all political persuasions and from so many parts of the profession, the Committee would have been hard pressed to come to any conclusion other than that her demonstrated professional competence is exceptionally outstanding. In this respect, and as is the intention behind our peer review evaluation, the rating communicates much more than the judgment of our fifteen members. With this important thought in mind, we summarize the basis of our conclusion that General Kagan possesses sufficiently outstanding professional competence to be rated “Well Qualified.”

## **A. Review of the Nominee's Writings**

The Standing Committee read the nominee's scholarly articles, plus representative samples of her other writings, including the briefs she submitted in the cases she argued as Solicitor General, and hundreds of other writings that came to our attention throughout this evaluation process.

In addition, as noted above, we also commissioned three "Reading Groups" to provide us with detailed feedback regarding the degree of professional competence demonstrated in a wide and representative range of the nominee's writings. The more than 300 pages of close analysis that resulted from the work of these groups were then shared with our entire Committee for its review.

Michael Gottesman, Professor of Law, led the Reading Group of 15 professors at Georgetown. Gregory P. Magarian, Professor of Law, led the 14 professors who participated in the Washington University Reading Group. Thomas Z. Hayward, Jr. and Roberta D. Liebenberg, both former Chairs of this Standing Committee, and Mary A. Wells, a former Standing Committee member, led the Practitioners' Reading Group, which consisted of 16 distinguished lawyers from around the country with substantial trial and appellate practices. The members of the Reading Groups and the substantive areas of their expertise and review are listed in Exhibits A, B, and C appended to this letter.

Our two law school Reading Groups summarized their conclusions as follows:

### **Washington University:**

"The members of the Washington University reading group strongly and unanimously conclude that Elena Kagan's writings reflect an exceptional level of professional competence. She consistently writes with intelligence, clarity, and rhetorical force. She thinks through difficult legal questions at a high level of abstraction and with careful attention to detail. Her academic writings demonstrate substantive mastery and theoretical sophistication, and they have

elevated every intellectual debate she has joined. Kagan’s oral arguments before the Supreme Court, and the accompanying briefs in the cases she has argued, combine mastery of the substantive law and rare intellectual agility to produce extremely persuasive legal arguments.”

**Georgetown University:**

“[A] reading of the fifteen reports in the aggregate would support a finding that, in the respects you asked us to focus on – quality, knowledge of the law, clarity, and analytical ability -- Kagan is well qualified to serve on the Supreme Court. Five say expressly that Kagan is well qualified to be a Supreme Court justice. Two others say expressly that she is well qualified in the respects you asked us to focus on. Six others provide unqualified praise for the materials they reviewed – either expressly or impliedly declaring those materials consistent with a ‘well qualified’ finding – but decline to provide a global assessment (no doubt because they had not read enough of Kagan’s work, as some of them say). Another reader declares Kagan “professionally competent for the role of Supreme Court Justice.”

One professor, while finding the reviewed writings “well written and analytically strong,” criticized the nominee for a “preference for reason over passionate idealism.”

Our Practitioners’ Reading Group, while recognizing that it had a smaller body of work to review, summarized its conclusions as follows:

[T]he substantial majority of the Practitioners Reading Group found that her substantive writings demonstrated keen intellect, command of the legal issues, thoughtful analysis, and clear, skillful writing.

For example, various group members reported:

“Solicitor Kagan’s work reflects a high degree of professional integrity and competence.”

\* \* \*

“General Kagan demonstrated a solid command of both the factual record and the governing precedent, and she was well prepared to answer all of the questions asked of her.”

\* \* \*

“She writes well and persuasively, and is an effective oral advocate and a gracious public speaker. I saw no lack of professional competence. To the contrary, she performed each task skillfully.”

\* \* \*

“Kagan’s law review article is a well-written, sophisticated analysis of complex constitutional law doctrine. Kagan offers an original and creative approach to a set of First Amendment problems. The article showcases her intelligent analysis of the issues, and an ability to think and write both at the broad, abstract level and more specifically about principles applied in particular situations.”

\* \* \*

The sole dissenter opined that General Kagan’s article on regulation of hate speech is built on unproven premises, and that she “oversimplifies complex issues.” The Standing Committee notes that this is the article that capped the nominee’s pre-tenure work at the University of Chicago, earning her tenure as a full professor. It was reviewed by both the hiring and tenure committees at Harvard Law School. The law school still uses the nominee’s first amendment writings in a class discussing the First Amendment.

The Standing Committee thanks the Reading Groups for their thoughtful and insightful work.

#### **B. Her Performance as Solicitor General**

General Kagan has served as Solicitor General for the last year and half. We interviewed lawyers in the Office of Solicitor General, lawyers on the opposing side of her office, lawyers who sought to advocate positions to her office, Supreme Court Justices who observed her argue, and former Solicitor Generals who observed or reviewed her performance to date. The clear picture that emerges is of an outstanding lawyer who confidently and diligently learns fast, masters new roles, and has a remarkable ability to understand and fairly assess numerous complex and important issues, all while fulfilling faithfully her assigned role as lawyer for the United States and a steward of the Office’s reputation.

### C. Prior Judicial Experience

One issue that we explored was the nominee's lack of judicial experience. With nominees to the trial bench, the Standing Committee historically looks for substantial courtroom and trial experience, either as a trial judge or trial lawyer. For prospective nominees to the courts of appeals, the Standing Committee places somewhat less emphasis on trial experience. Instead, we look more for an especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence.

It is these latter qualities that are especially relevant in considering nominees to the U.S. Supreme Court.<sup>6</sup> Forty justices of the Supreme Court, including 21 of the 59 who joined the Court since 1900, had no prior judicial experience. While prior service as an appellate judge at the state or federal level can certainly provide a nominee with the opportunity to develop and demonstrate the required competencies, so, too, can serving as a practicing lawyer, or as a legal scholar and a teacher, or as Solicitor General. As set forth in the *Backgrounder*, the Standing Committee has therefore long recognized that other distinguished accomplishments in the field of law other than judging or working as a practitioner – such as teaching law – may be considered in evaluating one's professional competence. In the case of the Supreme Court, the extensive and in depth writing, research, debate and teaching of broad areas of law may well satisfy the Standing Committee's criteria for evaluating professional competence. This is particularly true where, as here, the nominee has demonstrated prowess in teaching, brief writing and oral advocacy at the very highest levels.

On this point, too, we look to the many lawyers and judges to whom we spoke, who almost uniformly agreed that a pre-eminent legal scholar who was tenured at both the University of Chicago and Harvard Law School, and then rose to become the Dean of Harvard Law School,

---

<sup>6</sup> *Backgrounder* at p. 9.

has in a sense acquired a peculiarly apt and broad understanding of the law that would well serve the Court. The overwhelming view of these judges, lawyers, and academics was that it was important to have on the Court former judges, and it was also important to have on the Court those who had spent their time before joining the Court engaged with the law otherwise, either as practitioners or academics or government officials.

Typical comments include the following:

“As far as this notion of not having a judge’s experience, that is nonsense. There is no reason one needs to have been a judge to be an excellent Supreme Court Justice.”

\* \* \*

“I do not think the fact that she has not been a judge is a disadvantage for being on the Court. You would not want everyone on the Court to have not been a judge and there should be some lawyers who are familiar with trials, but there should also be some who come at it from a different perspective, particularly if you can get someone as smart as she is.”

\* \* \*

“I think it is a plus to have some people on the Supreme Court who were not prior judges simply so they bring to bear another perspective on how the law works, how people think about the law and how the law affects people.”

\* \* \*

“I also do not think that prior service on a court is in any way a requirement for being well qualified to serve on the U.S. Supreme Court.”

\* \* \*

“Generally speaking, I think it’s very good to have members of the Supreme Court who have been experienced judges and to also have members of the Supreme Court who have not been judges, but who have been intimately involved in the law in other capacities. Here, her involvement as a stellar scholar, a dean of a law school, and lawyer within the upper reaches of the government, is in my view, excellent and sufficient to make someone more than well qualified.”

\* \* \*

“[As a federal appellate judge], I can weigh-in on the general notion of whether you need to be a judge to serve on the U.S. Supreme Court. My answer is an emphatic ‘no.’ I actually think it is a mistake to have a Supreme Court in which everyone had prior substantial judging experience. My ideal court would have five or six people who have experience as judges, then perhaps a politician, and most certainly a practitioner, and a law professor. I think it is deeply unfortunate that we do not have a practitioner on the Court, someone who really knows how the law is applied in practice. For these reasons, I am thrilled that the President has looked beyond sitting judges to make this appointment. In my view, if you look at filling the particular spot on a particular court, the fact that she is not a judge makes her more rather than less qualified because of what she will bring to the Court that the Court does not have.”

\* \* \*

“As a sitting judge, I am not at all concerned by the fact that she has not had any experience as a judge. In some ways, judicial experience is less relevant to the Supreme Court than it would be to either our court or a trial court. This is an excellent appointment.”

\* \* \*

“Based on [personal prior judicial experience], I can say that I am actually pleased to see the President putting someone on the Supreme Court who does not have judging experience, but who has some other experience that demonstrates a deep commitment to the law and a set of skills that a judge does not necessarily have. Mind you, I think it is important that there be people on the Supreme Court who have judging experience. I just do not think that you end up with the best Supreme Court if all the judges are prior judges.”

\* \* \*

“I think the notion that you need prior judging experience to be on the U.S. Supreme Court is nonsense. I have known many superb judges who were neither judges nor litigators before they arrived on the bench, yet they were great from the get-go because of their intellect, their understanding of the law, their temperament, their discipline and their energy.”

Overall, the praise for General Kagan’s professional competence is supported by the record of her career as a whole. She is a *summa cum laude* graduate of Princeton, *magna cum laude* and law review at Harvard, with a master’s in philosophy from Oxford. General Kagan thereafter successfully twice traveled the tenure track at a top law school, once at the University

of Chicago and a second time at Harvard. Having also served in two different positions for four years in the White House under President William J. Clinton, she has an understanding of government that some judges may never acquire. As a professor, she taught courses in at least four different subject areas. As a Dean, she was required to study the scholarly work of all tenure candidates and new hires to the faculty at Harvard Law School. As a result, she has a breadth of deep knowledge that few practicing lawyers and judges ever reach. As Dean of Harvard Law School, she demonstrated interpersonal skills and an understanding of how large institutions work and how to build coalitions. As Solicitor General, the proverbial “tenth justice,” she knows more than anyone not now on the Court about the Court’s current docket and decisions.

### **3. Temperament**

General Kagan’s temperament is evidenced in part by the fact that she is held in such high regard by so many different people in so many different places. Accomplishing all she did at Harvard Law School required a very difficult and unusual balance of competing views and interests, a strong will, high expectations, listening, sense of humor, and an ability to find common ground. She is uniformly described as compassionate and interested in her students and was accessible to students and faculty. She sets high expectations for herself and others who work with her. She concedes to rare moments of testiness, yet those who work most closely with her are her strongest advocates.

Representative comments we received ran as follows:

“Over time, I noticed that whenever an issue came up that was such that many people, particularly in academia, might take somewhat of a doctrinaire or ideological approach, she seemed to be open-minded and arrive at a very thoughtful and considered judgment that actually fit the facts. She didn’t seem to be the sort of person who quickly labeled a matter and then pre-judged it according to the label.”

\* \* \*

“The way I would best describe Elena in this context is to describe her as more of a judge than often many judges themselves are. She has an open mind that actively solicits all points of view. If she has any firm decisions or values on the big issues that are now before the court, I do not know what they are and I know her well. I think what that means is that on these very tough issues she simply does not have a categorical position that would be obvious to one who knows her well. She is analytically very smart. I have seen on occasions her change her mind on things after hearing new evidence and arguments. She listens so well that she often has an excellent memory of what people say, so much so that it’s better than what the people themselves have of what they said. She’s a very balanced person generally.”

\* \* \*

“Her temperament is splendid. She is a fair listener and she respects the opinions of others even if she disagrees with them.”

\* \* \*

“Elena Kagan was enormously successful as our Dean. I’ve been teaching at the Law School for roughly [ ] years, so I have a pretty good historical overview and pretty good sense of the difficulties involved in running such a demanding institution with so many very demanding people. Elena simply could not have pulled this off were she not quite remarkably talented in terms of her competence, integrity and temperament. Early on as a faculty member she developed a reputation for listening to people and for finding a way to cut to the heart of matters, a place where there was often more agreement than people had anticipated.”

\* \* \*

“Elena could not have been more successful as Dean. Harvard Law School is an incredibly complex operation, with 2,000 students or so, over 100 fulltime faculty, and a very large budget. Dealing with the faculty alone would overtax the abilities and capabilities of almost anyone. Elena’s performance across-the-board was really extraordinary. Were there occasions when she made people unhappy or barked at someone? Yes. I had one incident myself where I got out in front of Elena on a very important matter regarding communicating with students about a particular exam. When she found out what I did, she let me have it, to the point of yelling at me. Frankly, I thought she was right and I was wrong and I do not have particularly thin skin. We have a very good relationship from working together on the appointments committee. We will often have some strong disagreements but communicate them clearly.”

\* \* \*

“I found her always open, easy to deal with, and obviously very intelligent.”

\* \* \*

“She is a person who came to be known on the committee as having strong views that she would present when she held them as such, but she would listen and, on occasion, but not always, yield to either conflicting evidence or contrary views. When I say ‘strong,’ I simply mean someone who clearly expressed their views and convictions in an effective manner, but was not overbearing. She readily achieved the confidence of the entire committee and all of us looked forward to our deliberations under her leadership. I guess I would say that she had a brilliant and strong mind and also a mind that was open to changing views in the face of new evidence or contrary arguments that convinced her otherwise.”

\* \* \*

“As far as my view of her overall attitude towards hiring, I think it fair to say that she paid little attention to ideology or methodology. By methodology, I mean she was open to political scientists, law and humanity types, doctrine people like myself, or economists, all of whom approach the teaching of the law in a slightly different way. When people say that she may have tended to hire more conservative people, I don’t know if they’re saying that as a compliment or criticism.”

\* \* \*

“She was cautious in forming views and was frank in conceding when questions were close calls. At the same time, when she formed her views, they were strongly held and effectively communicated. This was a committee of very strong willed and articulate people. She held her ground well, yet also could see opportunities for developing common ground. She did place a high priority on consensus. Looking at her performance as Dean overall, the observation I would make is that she was right down the middle of the pike on the theoretical/practical spectrum. Some people view legal scholarship as essentially a theoretical or academic exercise. Others stress the fact that we are training lawyers and we need to keep our feet on the ground, being very practical minded. Elena managed to stay in the middle ground between these two extremes and it is that tendency that I would point to as probably the best indicator of how she would be on the Court.”

\* \* \*

Those who have worked with her in the Office of Solicitor General also find her temperament to be on a par with her abilities. Her temperament in this position over the past year

and one half is described as “calm and even” and she respects and invites different and opposing views. She questions thoroughly because she wants to understand the positions of all parties. She is held in high esteem by her colleagues, is respectful of others, and is said to treat “everyone with dignity and respect.” Setting high expectations of herself and others in meeting the responsibilities of her office, she is described as a careful listener who does not impose “pre-formed views.”

In sum, the consensus is that the nominee is demanding, open-minded, and works well with others in a collaborative setting to decide important issues of law involving considerable complexity. We find her temperament to be well-suited to the job at hand and deserving of the “Well Qualified” rating.

### **CONCLUSION**

Mr. Chairman, let me say once again what we noted when we last testified before this Committee: the goal of the ABA Standing Committee has always been – and remains – in concert with a goal of your Committee: to assure a qualified and independent judiciary for the American people.

Thank you for the opportunity to present this statement concerning the professional qualifications of General Kagan.

**EXHIBIT A**

**ACADEMIC READING GROUP**

**GEORGETOWN UNIVERSITY LAW CENTER**

**Chair**

**Michael Gottesman**, Professor of Law

(Equal Protection, Substantive Due Process, Second Amendment, Twenty-First Amendment, Separation of Powers, Employment Discrimination, Voting Rights, Other Civil Rights, Labor and Employment)

**Members**

**Hope Babcock**, Professor of Law

(Administrative Procedure, Environmental Law, Freedom of Information Act, Indian Law, Justiceability, Regulated Industries, Statutory Interpretation)

**Sonya Bonneau**, Associate Professor of Legal Research and Writing

(Legal Research and Writing)

**Michal J. Cedrone**, Associate Professor of Legal Research and Writing

(Death Penalty and Habeas Corpus, Federal Sentencing, Other Criminal Law & Procedure, First Amendment – Religion, Prisoner Civil Claims/Eighth Amendment, Health Law and Insurance Programs)

**Sherman L. Cohn**, Professor of Law

(Civil Procedure, Appellate Procedure, Jurisdictional and Choice of Law, Professional Responsibility, International Law)

**John Copacino**, Professor Law

(Director of the Criminal Justice Clinic and the E. Barrett Prettyman Graduate Fellowship in Criminal Trial Advocacy)

**Michael R. Diamond**, Director of the Harrison Institute for Housing and Community Development, Georgetown Law; Professor of Law

(Corporate Law)

**Laura Donohue**, Associate Professor of Law

(National Security Law)

**Steven Goldblatt**, Director, Appellate Litigation Clinic; Co-Director, Supreme Court Institute; Professor of Law

(Appellate Practice, Criminal Law, Civil Rights, Constitutional Law)

**Michael Golden**, Associate Professor of Legal Research and Writing  
(Legal Research and Writing)

**Melissa Henke**, Associate Professor of Legal Research and Writing  
(Legal Research and Writing)

**Greg Klass**, Associate Professor of Law  
(Contracts, Jurisprudence)

**Julia L. Ross**, Professor of Legal Research and Writing  
(Legal Research and Writing)

**Rima Siorta**, Associate Professor of Legal Research and Writing  
(Legal Research and Writing)

**Abbe Smith**, Co-Director, Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program;  
Professor of Law  
(Criminal Law, Criminal Procedure, Trial Advocacy, Legal Ethics)

## **EXHIBIT B**

### **ACADEMIC READING GROUP**

#### **WASHINGTON UNIVERSITY IN ST. LOUIS SCHOOL OF LAW**

##### **Chair**

**Gregory P. Magarian**, Professor of Law  
(Constitutional Law, Legislation, Political Speech)

##### **Members**

**Scott A. Baker** – Professor of Law  
(Commercial Law, Intellectual Property)

**Kathleen F. Brickey** – James Carr Professor of Criminal Jurisprudence  
(Criminal Law)

**Marion Crain** – Wiley B. Rutledge Professor of Law and Director of the Center for the Interdisciplinary Study of Work and Social Capital  
(Labor Law, Employment Law)

**John N. Drobak** – Professor of Law  
(Civil Procedure, Property, Antitrust)

**Douglas Bruce LaPierre** – Professor of Law  
(Appellate Procedure, Constitutional Law)

**Stephen H. Legomsky** – John S. Lehmann University Professor  
(Immigration and Refugee Law, International Human Rights)

**Ronald M. Levin** – Henry Hitchcock Professor of Law  
(Administrative Law)

**Mae C. Quinn** – Professor of Law and Co-Director of the Civil Justice Clinic  
(Criminal Procedure)

**Neil M. Richards** – Professor of Law  
(Privacy Law, Constitutional Law)

**Laura Ann Rosenbury** – Professor of Law  
(Labor and Employment Law)

**Hillary Sale** – Walter D. Coles Professor of Law and Professor of Business  
(Corporate and Securities Law)

**Melissa A. Waters** – Professor of Law  
(International Law)

**Peter J. Wiedenbeck** – Joseph M. Zumbalen Professor of Law  
(Federal Income Taxation, ERISA & Employee Benefits)

## **EXHIBIT C**

### **PRACTITIONERS' READING GROUP**

#### **Chairs**

**Thomas Z. Hayward, Jr.,**  
K&L Gates LLP, Chicago, IL

**Roberta D. Liebenberg**  
Fine, Kaplan & Black, Philadelphia, PA

**Mary A. Wells**  
Wells, Anderson & Race, LLC, Denver, CO

#### **Members**

**Judge Phyllis W. Beck (ret.),** Philadelphia, PA

**Landis C. Best**  
Cahill Gordon & Reindel LLP, New York, NY

**John J. Bursch**  
Warner Norcross & Judd LLP, Grand Rapids, MI

**W. Wayne Drinkwater, Jr.**  
Bradley Arant Boult Cummings LLP, Jackson, MS

**David S. Friedman**  
Senior Counsel, Boston Red Sox, Boston, MA

**Richard B. Kapnick**  
Sidley Austin LLP, Chicago, IL

**The Honorable Timothy K. Lewis**  
Schnader Harrison Segal & Lewis LLP, Washington, DC

**Andrew M. Low**  
Davis Graham & Stubbs LLP, Denver, CO

**Wendy Lumish**  
Carlton Fields, P.A., Miami, FL

**Aaron M. Panner,**  
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC

**Chilton Varner**

King & Spalding LLP, Atlanta, GA

**Paul Watford**

Munger, Tolles & Olson LLP, Los Angeles, CA

**Sheryl J. Willert**

Williams Kastner, Seattle, WA