

U.S. Senator Lisa Murkowski
August 04, 2010
Floor Statement on the Nomination of Elena Kagan to the U.S. Supreme Court
*** As Prepared for Delivery ***

Mr. President. On July 2nd, following the conclusion of hearings on Elena Kagan's nomination to serve as Associate Justice of the United States Supreme Court, I informed my colleagues and my constituents in the State of Alaska that I could not support her nomination.

I decided to express my views at that time in summary form, knowing that I would get many questions about Ms. Kagan in the course of my travels during the Independence Day recess when I was up in the state.

Many of the Alaskans who I encountered during that trip and in subsequent visits to Alaska during July indicated that their concerns about Ms. Kagan's qualifications to serve were similar to mine.

That said Alaskans are a diverse and independent people who are accustomed to speaking their minds and it is fair to say that I have also heard from those who strongly support Solicitor General Kagan's nomination. I respect both viewpoints. But I am required by the Constitution to make an up or down decision.

I regard a Senator's vote to confirm or not to confirm a Supreme Court nominee as one of the most important responsibilities bestowed on this body by the United States Constitution. I believe it is a Senator's responsibility to evaluate each nominee on his or her own merits, consider the record with great reflection, and explain her conclusions to the body and her constituents.

So I come to the floor today to expand the thoughts I expressed earlier about the Kagan nomination, as well as to offer some observations about the composition of the Court going forward.

As I observed in early July, there is no doubt in my mind that Elena Kagan is a gifted teacher of the law. Watching the confirmation hearings, I was impressed with her command of

the Supreme Court's precedents and her ability to explain those precedents in language that non-lawyers could understand.

In the course of those hearings Elena Kagan vowed to respect Supreme Court precedent. But she offered little insight into the circumstances that might lead her to overturn established precedent. And even less insight into how she would approach those cases when precedent was not clearly established.

Most troubling, Ms. Kagan's responses to the questions posed to her in the Judiciary Committee indicated gaps in her understanding of the Constitution. Indeed the most glaring of these gaps involved the right to keep and bear arms, guaranteed to law abiding Americans under the Second Amendment.

This is a matter of great significance to my constituents in Alaska, so I find myself compelled to discuss it at some length here.

There was a colloquy between our colleague, Senator Grassley and Solicitor General Kagan that sticks very clearly in my mind. Senator Grassley began his question by observing that the Supreme Court in the Heller case concluded that the Second Amendment involves an individual right to possess firearms, not a collective right conditioned by participating in a militia.

Senator Grassley further noted that the Supreme Court ruled in McDonald that the individual right recognized in Heller is applied to the states through the doctrine of incorporation via the 14th Amendment.

Senator Grassley then went on to ask Ms. Kagan whether she personally believes that the Second Amendment includes an individual right to possess a firearm.

But, Elena Kagan did not answer the question. Her response was – quote – “I have not had myself the occasion to delve into the history that the courts dealt with in Heller.”

Senator Grassley asked straight on, “Do you believe the Second Amendment conveys an individual right?” Once again, Ms. Kagan ducked the question. She said that she lacked the wherewithal to grade Heller, because the case is based so much on history she never had an

occasion to look at. This is very similar to the comments that she expressed to my colleague from Nevada who just spoke before me.

I find it difficult to accept that an individual who occupied the role of Dean of Harvard Law School and Solicitor General of the United States would never have had occasion to look at the history underlying the Second Amendment.

My constituents in Alaska have long understood this right to be fundamental, personal in nature, and binding on both the federal government and the States, just as the courts in *Heller* and *McDonald* have held. I view our Second Amendment rights in the same way. Yet Elena Kagan evidently never thought much of the question.

You have to wonder...is this just a lack of preparation or does Elena Kagan really think that the Second Amendment right is insignificant? Again, you have to wonder.

Ms. Kagan had fair and sufficient warning that she would be questioned vigorously about her views on the Second Amendment. Justice Sotomayor faced intense questioning on the same subject a year ago.

I doubt that Dean Kagan would accept an answer, "Sorry, I'm not prepared to answer the question," from one of her Harvard Law School students if posed the same question that Senator Grassley asked. With all due respect for the nominee, I'm not prepared to accept this kind of answer from a prospective justice of the United States Supreme Court.

To put it perhaps a bit more bluntly, I would have expected that a constitutional law expert of Ms. Kagan's stature would have devoted some serious intellectual attention to that question at some point at her career. And truthfully, I cannot be sure that she does not hold strong personal views about the Second Amendment. Views that she is unwilling to express because they might pose an impediment to her confirmation. This is by no means mere speculation.

While serving as a law clerk to Justice Thurgood Marshall, Ms. Kagan had an opportunity to comment on a petition for certiorari for a person charged with the possession of an unregistered firearm. The petitioner asked the Supreme Court to determine whether the D.C. gun control law violated his Second Amendment rights.

Ms. Kagan dismissed his argument and in a note devoid of any legal analysis, she simply told Justice Marshall, “I am not sympathetic.” Not sympathetic suggests some knowledge of the Second Amendment. And if Ms. Kagan were uncertain about whether she knew enough about the Second Amendment to make a recommendation to Justice Marshall, perhaps she might have done more research.

One is also left to wonder whether, Solicitor General Kagan was unsympathetic to the view that the 2nd Amendment applies to the states when the Justice Department decided it would not file a brief in the McDonald case. We may never know the answer to this question, because the deliberations of the Solicitor General’s office are privileged.

The conclusion I draw from all of this is that Ms. Kagan is at best uninterested in the Second Amendment at this point in her career. At worst, she is unsympathetic to the millions of Americans, who like this Senator, believe that the Second Amendment is one of the most important of our Constitutional liberties. On this basis alone, I cannot support her lifetime appointment to the highest court in the land.

But this is not the only basis on which I find I must vote against the nominee. If confirmed to serve on the Supreme Court, Elena Kagan will be one of the least experienced Supreme Court Justices in our Nation’s history. It is often observed that one need not have judging experience to sit on the Supreme Court. But all of the Supreme Court justices who did not have judging experience had extensive courtroom litigation experience. Elena Kagan has neither. While it is true that she spent a brief period of time as a junior associate in a prestigious Washington law firm, she has spent most of her professional career as a law professor, a university administrator and as a political appointee focused on matters of public policy.

Ms. Kagan’s extensive experience as a policy advisor, when compared with her sparse experience as a litigator, should concern all of us.

During her confirmation hearings, Ms. Kagan was asked repeatedly whether she could set aside her interest and experience in matters of public policy and refrain from legislating from the bench. She said she could. Time will tell whether the benefit of the doubt is justified.

However, Ms. Kagan's answers to questions concerning her willingness to defer to unelected bureaucrats on questions of environmental law is quite troubling to me. History demonstrates that agencies at times are quite activist in interpreting the gaps that Congress intended them to fill through regulations. It is well known throughout this body that I don't believe that Congress ever intended for the EPA to set climate policy through Clean Air Act regulations.

On two occasions before the Judiciary Committee, Ms. Kagan expressed the view that it is legitimate for courts to give great deference to federal agencies as they interpret Congressional mandates.

I understand that it is settled precedent for federal courts to defer to administrative agencies in appropriate cases. However, I also think this administration's activism demands a more skeptical look at agency rulemaking exercises. Ms. Kagan, on the other hand, enthusiastically endorsed the position that the decisions of unelected bureaucrats deserve great deference because federal agencies have expertise and are accountable to the elected executive. I think this approach will continue to diminish the role of Congress in lawmaking and will result in less accountability to the electorate, not more, as Ms. Kagan suggests.

I am also concerned about the deference that a Justice Kagan might give to international law in interpreting the Constitution and laws of the United States. Perhaps there is a limited role for the consideration of international or foreign law when the issues posed in the case unavoidably turn on the interpretation of a treaty or a foreign law. But unlike Ms. Kagan I would not think that a federal judge at any level should cite foreign or international law in its decision simply because that judge is open to "good ideas wherever they come."

When the Senate inquires as to whether a nominee is qualified for the Court, it is asking a very specific question: Does the nominee understand, and is she prepared to assume, the role of an impartial judge in our Constitutional system?

I have reluctantly come to the conclusion that Elena Kagan does not rise to this standard. During her confirmation hearings, Elena Kagan exhibited charm and wit, even as she dodged and weaved her way through the serious questions that were put before her. I would have preferred a bit less cleverness and a lot more serious reflection.

As I reflect back upon the record before me... as I think about the way Ms. Kagan answered the Second Amendment questions posed to her, her lack of substantive legal experience, her comfort with the judgments of unelected bureaucrats, her acceptance of the use of international law as persuasive authority in U.S. court decisions... I'm just not comfortable with this nominee.

I understand that others of my colleagues may not share this view and that conventional wisdom holds that Elena Kagan will be confirmed to the Supreme Court. I would like to close with a few observations about the composition of the court going forward.

Ms. Kagan, like this administration's last nominee, Justice Sotomayor, is a native of New York City. Although she spent a portion of her career in Chicago, most of her career has been spent 'inside the beltway' of Washington, D.C., and Cambridge, Massachusetts.

If Elena Kagan is confirmed, six of the nine Supreme Court Justices will be from the Northeast United States, and only three law schools of the 199 law schools accredited by the American Bar Association will be represented on the high court.

Our colleague, Senator Feingold took note of this during the confirmation hearings. Senator Feingold made reference to a question he received from one of his constituents at a town hall meeting. That constituent asked why nominees to the Supreme Court always seem to be from the East Coast, when we have plenty of fine candidates in the Midwest. Senator Feingold followed up by asking Ms. Kagan, "How will you strive to understand the effects of the Supreme Court's decisions on the lives of millions of Americans who don't live on the East Coast or in our biggest cities?"

The same question is on my mind today, just as it was last summer when I spoke on the nomination of Justice Sotomayor.

I welcome the fact that this administration has substantially increased the representation of women on the high court. Yet it is of greater significance to me that the administration has not increased the representation of people from the West or from rural backgrounds on the court.

I would suggest, given the composition of the Supreme Court at this point in our history, it is important for the Justices to venture beyond the bench and the beltway. It is important that they get to know how Americans with different backgrounds than theirs think about their country. And I might suggest that they start with a visit to Alaska.

If Elena Kagan is confirmed to the Supreme Court I wish her well in the discharge of her crucial duties. The liberties we treasure dearly will depend on her wise and thoughtful judgments. I thank the President.

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