

REPORT ON THE NOMINATION OF SOLICITOR GENERAL ELENA KAGAN

New York City Bar Association

June 22, 2010

On April 9, 2010, Justice John Paul Stevens announced his retirement from the Supreme Court of the United States. On May 10, President Barack Obama nominated Elena Kagan, Solicitor General of the United States, to fill the vacancy created by Justice Stevens' retirement. The New York City Bar Association formed a Subcommittee to Evaluate the United States Supreme Court Nominee in order to assess Solicitor General Kagan's qualifications to serve on the Supreme Court.

The New York City Bar, through its Subcommittee and Executive Committee, has evaluated Solicitor General Kagan's qualifications in accordance with its guidelines and finds her Highly Qualified to serve as an Associate Justice of the Supreme Court.

We reviewed and analyzed information from a variety of sources: Solicitor General Kagan's work papers, briefs and oral arguments from her service as the Solicitor General; her law review articles from her time at Harvard Law School and the University of Chicago Law School; her papers and analysis generated while she was in the Clinton White House; memos written when she was a clerk for Supreme Court Justice Thurgood Marshall; numerous speeches over the past 18 years; her 2009 testimony in the Senate hearings concerning her confirmation as Solicitor General; comments received from New York City Bar members and committees; a wide range of press reports, blogs and commentaries; and interviews with more than 80 individuals who worked with the Solicitor General in various capacities throughout her legal career.

We evaluated the extent to which Solicitor General Kagan possesses the following eight qualifications, as outlined by the New York City Bar's guidelines for evaluation of nominees to the Supreme Court of the United States: (1) exceptional legal ability; (2) extensive experience and knowledge of the law; (3) outstanding intellectual and analytical talents; (4) maturity of judgment; (5) unquestionable integrity and independence; (6) a temperament reflecting a willingness to search for a fair resolution of each case before the Court; (7) a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; and (8) an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of Congress and the President.

We concluded that Solicitor General Kagan is Highly Qualified to serve as an Associate Justice of the Supreme Court of the United States. First, Solicitor General Kagan possesses exceptional legal ability and intellectual prowess, and has a record of extraordinary success in many different capacities at the pinnacle of the legal profession. Second, Solicitor General Kagan has extensive legal experience as Solicitor General and in the Clinton White House that will serve her well on the Supreme Court. Third, Solicitor General Kagan's frequently-cited ability to listen, to internalize the arguments on the other side of an issue and to bring people of

disparate viewpoints together will serve her and the Court well if she is confirmed. Fourth, Solicitor General Kagan's record reveals a keen understanding of the constitutional limitations on judicial power and the importance of adherence to precedent, including an impulse to refrain from having the Court resolve significant legal issues prematurely or unnecessarily, and a gravitation to positions that hew closely to existing precedent and are tied narrowly to the facts of a case. Finally, we are not troubled by Solicitor General Kagan's lack of judicial experience, as numerous prominent Supreme Court Justices came to the Court without judicial experience, and Solicitor General Kagan's practical experiences as a White House policy advisor and Solicitor General and very successful experience as Dean of a leading law school provide a unique background that will be a useful perspective on the Court.

The New York City Bar's Ratings and Guidelines

The New York City Bar is among the longest-established bar associations in the United States and at present consists of over twenty-three thousand members, many of whom are from other parts of the country. We have been evaluating judicial candidates for 140 years in a nonpartisan manner based on the nominees' competence and merit. Although the New York City Bar has evaluated a number of Supreme Court candidates over the course of its history, in 1987 it determined to evaluate every candidate nominated to the Supreme Court.

In 2007, the Executive Committee of the New York City Bar moved from a two-tier evaluation system, in which candidates were found to be either "qualified" or "unqualified," to a three-tier evaluation system. The ratings and the criteria that accompany them are as follows:

"Qualified." The nominee possesses the legal ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, common sense, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects precedent, the independence of the judiciary from the other branches of government, and individual rights and liberties.

"Highly Qualified." The nominee is qualified to an exceptionally high degree, such that the nominee is likely to be an outstanding Justice of the United States Supreme Court. This rating should be regarded as an exception, and not the norm, for United States Supreme Court nominees.

"Not Qualified." The nominee fails to meet one or more of the qualifications above.

Summary of Findings

a. Highlights of Solicitor General Kagan's Background

While Solicitor General Kagan's background has been documented extensively elsewhere, it is useful to offer a brief summary of her life to provide context for our review. Solicitor General Kagan was born on April 28, 1960, on New York City's Upper West Side, the middle child of three children. Her mother taught fifth and sixth grades at Hunter College

Elementary School. Her father was a lawyer who represented tenant associations. Solicitor General Kagan attended Hunter College High School.

She graduated *summa cum laude* and Phi Beta Kappa from Princeton University in 1981, where she received a Sachs Scholarship. Her senior thesis, entitled “To the Final Conflict: Socialism in New York City, 1900-1933,” explores the collapse of the American Socialist Party in the early decades of the twentieth century.¹

After graduating from Princeton, Solicitor General Kagan pursued a Master’s degree in Philosophy from Oxford University. Her philosophy thesis examines the importance of principled reasoning in judicial decision making through the lens of the Fourth Amendment’s exclusionary rule.²

In 1983, Solicitor General Kagan enrolled in Harvard Law School. She served as supervising editor of the Harvard Law Review and was a research assistant to Professor Laurence H. Tribe. She graduated *magna cum laude* in 1986.

Upon graduating from Harvard Law School, Solicitor General Kagan clerked first for Judge Abner Mikva of the D.C. Circuit and subsequently for Justice Marshall on the Supreme Court. She then worked as an associate at the law firm of Williams & Connolly in Washington, D.C., where she handled a mix of commercial litigation, First Amendment litigation, and criminal matters.

After two years in private practice, Solicitor General Kagan secured a position as a full-time faculty member at the University of Chicago Law School in 1991. She was granted tenure in 1994. At Chicago, she wrote two of her most prominent academic articles on First Amendment law. She also served briefly as special counsel to the Senate Judiciary Committee, then chaired by Senator Joseph Biden, in the confirmation hearings for Justice Ruth Bader Ginsburg in 1993.

Solicitor General Kagan left teaching in 1995 to serve as Associate Counsel to President Clinton. In 1997, she became Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. Among her responsibilities as a domestic policy advisor in the White House, she analyzed the Attorney Generals’ tobacco settlement and participated in an effort to pass legislation giving the Food and Drug Administration the authority to regulate tobacco. President Clinton nominated Solicitor General Kagan to serve as a Circuit Judge on the U.S. Court of Appeals for the D.C. Circuit in 1999; no action was ever taken on the nomination (a hearing was never scheduled), and Solicitor General Kagan returned to academia.

¹ Elena Kagan, *To the Final Conflict: Socialism in New York City, 1900-1933*, at 129-30 (Apr. 15, 1981) (unpublished A.B. thesis, Princeton University) (on file with Mudd Library, Princeton University).

² Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, at 3-6 (Apr. 20, 1983) (unpublished M. Phil. thesis, University of Oxford) (on file with Bodleian Library, University of Oxford).

Solicitor General Kagan sought to resume her tenured position at the University of Chicago Law School, but was not offered a position. The faculty reportedly believed that Solicitor General Kagan was more interested in public service and work in government than in being a full-time scholar. Solicitor General Kagan joined the faculty of Harvard Law School instead, first as a visiting professor in 1999, then as a tenured professor in 2001. Her scholarship at Harvard focuses on administrative law; one of her articles examines the power granted the president to direct administrative agencies. She was appointed Dean of Harvard Law School in 2003. As Dean, she is credited with reforming the first-year curriculum; presiding over a massive capital campaign; improving the student facilities; and making the faculty more inclusive and ideologically diverse by hiring conservative faculty members and facilitating faculty dialogue. Solicitor General Kagan was also vocal in her opposition to the military's "Don't Ask, Don't Tell" policy; she argued that allowing the military to recruit on the campus of the law school constituted a violation of the school's antidiscrimination policy. Solicitor General Kagan served as Dean until President Obama nominated her as Solicitor General in 2009. As Solicitor General, she argued six cases before the Supreme Court and supervised many other cases argued to the Court, in addition to supervising U.S. appeals in the Federal Circuit Courts.

b. Supreme Court Briefs and Oral Arguments as Solicitor General

The briefs and arguments advanced by Solicitor General Kagan reveal that she writes clearly and treats precedent fairly, carefully and precisely. Her writing tends to avoid lofty policy pronouncements in favor of a dispassionate evaluation of legal issues. The structure of her briefs suggests that she seeks to avoid resolving significant legal issues prematurely or unnecessarily. Thus, substantial portions of the briefs are often devoted to procedural or jurisdictional arguments, in addition to the merits, and the arguments advanced are closely tied to the facts of the specific case. The briefs hew closely to existing precedent, suggesting an instinct to present cases narrowly, without overreaching.

These stylistic characteristics of Solicitor General Kagan are reflected in her oral argument in the *Citizens United* case, one of the most closely watched and controversial cases before the Court during her tenure as Solicitor General. The case involved a challenge to a provision of the federal campaign finance law that barred corporate expenditures advocating the election or defeat of a specific candidate within 30 days of an election. Solicitor General Kagan's argument was technical and theoretical in defending the Court's existing precedent (which it appeared that the Court was poised to overrule), rather than addressing core values and policies in compelling terms.

Argument transcripts reveal that Solicitor General Kagan was an extremely capable advocate for the government. Typically she answered questions posed by the Justices directly, maintained her focus, and was well-prepared overall for oral argument. At several points she injected an appropriate degree of levity into her answers, suggesting that she was secure in her arguments and presentation .

c. Articles

Solicitor General Kagan's articles demonstrate meticulous research and argumentation. One of her specialties is comparing cases not normally associated with one another and using them to demonstrate inconsistencies in major judicial principles. Her talent for synthesizing a wide range of doctrines is evidenced in her seminal First Amendment piece, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996). In this essay, Solicitor General Kagan surveys the different interpretative approaches to classifying the Court's First Amendment jurisprudence and argues that the underlying principle at the root of the Court's decisions is a search for governmental motive. Solicitor General Kagan argues that "ferreting" out impermissible governmental motive is more important to the Court than determining the effects of the law at issue. Her article brings clarity to First Amendment jurisprudence by identifying the common theme of a search for motive in the Court's decisions that helps to explain what would otherwise appear to be inconsistent decisions.

Solicitor General Kagan's other major area of scholarship involves administrative law. Her extensive article, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001), draws heavily on her experience in the Clinton White House to advance the argument that direct presidential authority over administrative agencies promotes "accountable and effective administration." Solicitor General Kagan credits President Reagan with implementing a greater degree of control over regulatory activity; she observes that President Clinton also emphasized this strategy, which she describes as "presidential administration." The key elements of this strategy are (1) the exercise of presidential authority to direct agencies and their heads to take particular steps, and (2) the subsequent appropriation of the resulting agency actions as presidential acts. Embedded in Solicitor General Kagan's argument for "presidential administration" is the idea that, in the absence of a specific congressional direction to the contrary, it should be presumed that the President has been authorized by Congress to "assert directive authority" over an agency head. Solicitor General Kagan endorses this strategy as being a desirable means of exerting influence over the vast federal bureaucracies. In so doing, she argues for strong presidential leadership with regard to independent regulatory agencies as long as it is not contrary to the stated intent of Congress.

d. Solicitor General Kagan's Speeches

Most of the 34 speeches, tributes, and other remarks that Solicitor General Kagan has given over the past 18 years were delivered at commencements or student events during her tenure as Dean of Harvard Law School and contain well-crafted, positive messages suitable to the occasion.

Some of Solicitor General Kagan's remarks over the years reveal the importance she attributes to adhering to precedent and the rule of law. In a 2007 keynote address to cadets at West Point Academy, Solicitor General Kagan described a debate in the Bush Administration over the legality of its wiretapping program as a prime example of the maxim that "the rule of law governs—that the law and its precepts reign supreme, no matter how high and mighty the

actor and no matter how urgent the problem.”³ In this speech, Solicitor General Kagan related an incident involving Jack Goldsmith, a former Bush Administration lawyer and leading scholar at the University of Chicago Law School whom she recruited in 2004 to join the faculty at Harvard Law School. She described Goldsmith’s reservations about the legality of the wiretapping program and praised his insistence “on steadfast adherence to legal restraints.”⁴

One of Solicitor General Kagan’s more noteworthy speeches also supports her view that strengthening the President’s power over administrative agencies represents the “most important development in administrative process in the last two decades.”⁵ According to Solicitor General Kagan, enhancing the President’s power vis-à-vis administrative agencies is beneficial because it publicly associates agency action with an accountable, elected official: “The presidency’s unitary structure, its visibility, its personality all make it likely to exercise administrative power in ways that the public can identify and evaluate. . . . In addition, presidential control of administration promotes responsiveness to the policy preferences of the general public.”⁶

e. White House Papers

We considered documents authored by Solicitor General Kagan during her tenure as domestic policy advisor in the Clinton White House from 1997-1999. These documents generally fit into two categories: first, memos, reports, etc. authored by Solicitor General Kagan herself (alone or with others), and second, documents authored by others that contain Solicitor General Kagan’s handwritten notes.

Most of the documents demonstrate that Solicitor General Kagan was primarily concerned with advancing President Clinton’s domestic agenda. The documents generally reflect an intelligent, high level, substantive analysis of important policy issues, sometimes accompanied by a discussion of political considerations, such as the proposed timing of an announcement and potential political ramifications. There is little indication that Solicitor General Kagan was formulating the Administration’s position on any subject addressed in the memoranda.

Solicitor General Kagan did advocate on behalf of the Daschle Amendment to the so-called Partial Birth Abortion Act in a memorandum authored jointly with Domestic Policy Advisor Bruce Reed. This Amendment provided an exception to the ban on partial birth abortion in cases where continued pregnancy would “risk grievous injury to [the mother’s] physical health.” Despite a statement by the Office of Legal Counsel that the Amendment was an unconstitutional violation of *Roe v. Wade*, Solicitor General Kagan recommended that President

³ Elena Kagan, Dean, Harvard Law School, *West Point Academy Keynote Address*, at 6 (Oct. 17, 2007).

⁴ *Id.* at 5.

⁵ Elena Kagan, *Remarks at Harvard Law School Faculty Workshop on Presidential Administration Article*, at 1, 2 (Nov. 17, 2000).

⁶ *Id.* at 6.

Clinton endorse the Amendment. Solicitor General Kagan’s view ultimately prevailed and the amended statute was upheld in the courts.

f. Justice Marshall Clerkship Materials

The materials from Solicitor General Kagan’s clerkship with Justice Marshall consist of bench memos written to the Justice advising him of the relative merits of cases to be argued before the Court and memos evaluating *certiorari* petitions.

The majority of the writings reviewed are responses to *certiorari* petitions, ranging from a few sentences to several pages in length. Because Justice Marshall did not participate in the “*cert pool*,” he required his clerks to produce memos on the thousands of petitions for review received by the Court, with special attention given to capital cases. Solicitor General Kagan’s memos written in response to the *certiorari* petitions reflect an analytic ability not only to grasp and comment on the legal issues raised by the petitions, but also to assess whether the cases were worthy of review by the Court. As evidenced by the memos, Solicitor General Kagan was sensitive to the correct role and scope of Supreme Court review. The memos reflect her concern that the Court only review issues of high importance that the lower courts had significant time to consider. Indeed, even in cases where she was clearly sympathetic to the particular facts raised by the *certiorari* petition, she would often urge Justice Marshall to deny the petition because the lower courts had not had the opportunity to consider fully the legal issues presented. In most cases, she recommended against granting *certiorari* because the issue was fact-bound, not clearly presented, already settled or not legally significant.

We noted the handful of cases in which Solicitor General Kagan recommended to deny *certiorari* due to concerns that, if the Court took the case, the result would be antithetical to Justice Marshall’s views. Thus, in some cases she would suggest voting to grant *certiorari* only if four other justices also voted in favor of granting review, thereby signaling their predisposition to reverse. Some have criticized Solicitor General Kagan’s recommendations as an attempt to elevate policy preferences above the dictates of the law. In our judgment, this criticism is unwarranted because the recommendations to deny *certiorari* are clearly reflective of Justice Marshall’s views. When asked about the Marshall clerkship memos during her confirmation hearing to become Solicitor General, Kagan explained that she does not “want to say that there was nothing of me in these memos” but that she was a “27-year-old pipsqueak” working for a “giant in the law” and that her job was to “channel him.”⁷

Overall, Solicitor General Kagan’s memos from this period were clearly written and logically sound. They demonstrate careful attention to each of the legal issues presented and an appreciation of the complexity of the issues before the Court. In one case, a memo indicated that she had had a change of heart on a particular issue, suggesting an open-minded approach. In addition, her commitment to enforcing statutes as written comes through clearly.

⁷ *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the U.S.*, 111th Cong., at 99 [hereinafter *Hearings*] (testimony of Elena Kagan).

g. Senate Judiciary Committee Confirmation Materials

We considered the questionnaires submitted to the Senate Judiciary Committee by Solicitor General Kagan in 1999, when she was nominated by President Clinton to the D.C. Circuit, and in 2009, when President Obama nominated her as Solicitor General, and in connection with the present nomination. In addition, we reviewed her testimony during the 2009 Confirmation hearings for Solicitor General and letters submitted to the Senate in response to her nomination.

The Senate Judiciary Committee's examination of Solicitor General Kagan covered a wide range of issues, including constitutional and statutory interpretation, separation of powers, the role of international law in US domestic law and other issues. In several different contexts, the Judiciary Committee inquired whether Solicitor General Kagan's personal views would influence the performance of her duties as Solicitor General. A video recording of the hearing reveals Solicitor General Kagan to be calm, poised, and articulate.⁸ She exhibited an incremental approach to tackling legal problems, a willingness to listen to and consider all questions, and a delight in engaging in discourse regarding legal issues. Her responses were substantive, immediately and directly responsive to the majority of questions, and evinced a strong commitment to disciplined legal reasoning coupled with a firm "respect for [the Court's] precedents and for the general principle of *stare decisis*."⁹

Solicitor General Kagan's testimony revealed some of her views on the Constitution and the role and work of the judiciary. Solicitor General Kagan believes that the Constitution imposes "limitations on government rather than establishes affirmative rights."¹⁰ With regard to constitutional interpretation, "the judge should look to the constitutional text, history, structure, and precedent" and "should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs."¹¹ With regard to statutory interpretation, Solicitor General Kagan believes that the best means is to look to the "actual language of the statutory provision in question and the legislative history (if any) surrounding it" before looking to any presidential signing statement or to foreign law.¹² However, she believes that foreign law may be used in certain limited circumstances, noting that it has been considered in the context of the Eighth Amendment. Regarding the proper role of the judiciary, Solicitor General Kagan stated that "it is a great deal better for the elected branches to take the lead in creating a more just society than for the courts to do so."¹³

⁸ See <http://www.c-spanvideo.org/program/283954-1>.

⁹ *Hearings, supra* note 7, at 157.

¹⁰ *Hearings, supra* note 7, at 168.

¹¹ *Id.*

¹² *Hearings, supra* note 7, at 169.

¹³ *Hearings, supra* note 7, at 167.

h. Highlights of Interviews

We interviewed more than 80 of Solicitor General Kagan's former colleagues from all phases of her legal career, including her fellow law clerks (from her clerkships with Judge Mikva and Justice Marshall); partners and associates she worked with at Williams & Connolly; academic colleagues and former students at the University of Chicago Law School and Harvard Law School; colleagues from her service in the Clinton White House; and colleagues from her tenure as Solicitor General.

Colleagues from every stage of Solicitor General Kagan's career were overwhelmingly positive in their assessments of her qualifications. Former colleagues praised Solicitor General Kagan's curious mind and incredible intellect and described her in glowing terms as a first rate lawyer and a calm, strong advocate. Comments from Solicitor General Kagan's time as an associate at Williams & Connolly suggest that she was given a great deal of responsibility for a junior associate, and that she performed extremely well. Many academic colleagues praised her scholarship as first-rate analytical pieces and noted that she was a successful and popular teacher. She was also described as an extremely disciplined thinker, a good strategist, and as having a tremendous ability to boil a question down to its essence. Her opinion was highly valued because she was not ideologically entrenched and was very effective at forging consensus among those with disparate views.

Solicitor General Kagan was highly thought of by her colleagues and students at Harvard Law School, with particular praise for her tenure as Dean. Many spoke very highly of her intellect and her scholarship, which was described as original, definitive and thorough. She also received very high marks from faculty, alumni and others at Harvard Law School for developing the Law School into an institution that is deeply loved by many. She did this by leading a highly successful fund raising effort and using the funds garnered to improve student facilities and positively reform the curriculum. At the same time, she was credited with making the faculty more open, collegial and diverse in terms of demographic factors, intellectual pursuits and ideology. She was also praised for superb enhancements of student facilities, reduction in class size, enhancement of the curriculum in numerous respects, and for genuinely commanding the respect of people of divergent viewpoints.

The New York City Bar's Assessment of the Nominee

The New York City Bar has evaluated Solicitor General Kagan based on the eight criteria set forth in our Guidelines and finds her to be Highly Qualified to serve as an Associate Justice of the Supreme Court. Below we highlight several of Solicitor General Kagan's strengths which we find particularly significant and relevant for service on the Supreme Court. We also consider whether she presents any serious potential weaknesses.

First, Solicitor General Kagan possesses exceptional legal ability and intellectual prowess. She has a record of extraordinary success in many different capacities at the pinnacle of the legal profession, including impressive clerkships, work at a top-flight law firm, tenured faculty positions at two of the nation's leading law schools (where she was widely regarded as an

extraordinary teacher), and service at high-level legal and policy positions in the White House and as the federal government's premier appellate lawyer. Our many interviews with present and former colleagues confirm that Solicitor General Kagan excelled at every one of these demanding positions, consistently impressing colleagues with her brilliance, intellect and analytic abilities.

Many of our sources commended Solicitor General Kagan's scholarship in enthusiastic terms, noting that while she may not have written a large number of articles, those she authored were substantial, well thought out pieces demonstrating a keen and engaged intellect that made creative contributions in two diverse fields – First Amendment law and administrative law. Solicitor General Kagan's scholarship did receive mixed reviews among a small number of those interviewed, but the few who questioned the merits of her academic work also stressed that the attributes necessary for a scholar differ from those required for the Supreme Court; we also note that the award of tenure to Solicitor General Kagan by the faculties at both prestigious law schools where she wrote these articles attests to the intellectual rigor of her work.

Second, Solicitor General Kagan has extensive legal experience that will serve her well on the Supreme Court. This experience includes responsibility for significant lawsuits and the development of litigation strategies. Our review indicates that she had extensive involvement with regard to supervision of the government's tobacco litigation while serving in the Clinton White House, and that she exercised a guiding hand in the intricacies of appellate litigation as Solicitor General – where she crafted the government's litigation strategy both in the Supreme Court and in approving government appeals from district courts, while closely supervising the writing of briefs. From her service as the federal government's chief advocate before the Supreme Court, Solicitor General Kagan has demonstrated a profound understanding of the Court's processes that will prove useful for her service on the Court, if she is confirmed.¹⁴ In addition, she also began her legal career with a clerkship for Justice Marshall that provided relevant and valuable experience.¹⁵

Some have expressed skepticism about Solicitor General Kagan's qualifications to serve on the Supreme Court based on her lack of judicial experience. Our review of the biographies of the Chief Justices and Associate Justices who have served on the Supreme Court from the outset of the Republic shows that the recent trend of selecting Justices from among the judiciary has not always prevailed and that many of the most distinguished members of the Court did not have prior judicial experience. Indeed, of the 98 Associate Justices in our nation's history, 34 lacked prior judicial experience, including such luminaries as Joseph Story, Louis Brandeis, Robert

¹⁴ There have been 48 Solicitors General in our nation's history. Four went on to serve on the Supreme Court: William Howard Taft, Stanley Forman Reed, Robert H. Jackson and Thurgood Marshall. Of the four, Justices Reed and Jackson lacked any judicial experience prior to serving on the Supreme Court.

¹⁵ Eight of the 22 individuals who have been confirmed for the Supreme Court since 1970 had previously served as a law clerk for a Supreme Court Justice: Byron White, Harry Blackmun, William Rehnquist, John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, John Roberts, and Samuel Alito.

Jackson, Felix Frankfurter, William Douglas and Hugo Black.¹⁶ Of the 17 Chief Justices of the United States, nine had no judicial experience before joining the Court – including prominent Chiefs such as John Marshall, Charles Evans Hughes, Harlan Fisk Stone, Earl Warren and William Rehnquist.¹⁷ Having assessed Solicitor General Kagan’s work history relative to that of prior Supreme Court Justices, we believe that lack of judicial experience is not a cause for concern.

Indeed, we believe that while prior judicial experience may provide valuable insight into how a nominee might perform on the Supreme Court, it is by no means the only basis on which to predict whether or not a nominee will perform well. Solicitor General Kagan’s impressive breadth of experience as a practicing lawyer, law professor, administrator, policy advisor and appellate advocate is highly valuable for a Supreme Court Justice to have. That is particularly true with regard to Solicitor General Kagan’s service as a domestic policy advisor at the highest level of the federal executive branch. This experience will enable her to provide the Court with an important perspective on the impact of judicial decisions. She will come to the Court with a first-hand understanding of the different roles and responsibilities of the three branches of the federal government.

We also address Solicitor General Kagan’s purported lack of litigation experience. Solicitor General Kagan is familiar with major litigation, having worked on significant litigation matters at Williams & Connolly, at the White House, and as Solicitor General of the United States. Indeed, her colleagues at the Solicitor General’s Office, other attorneys at the Justice Department, and senior lawyers at federal departments and agencies she represented praised her ability to synthesize complex legal arguments and make sound tactical decisions; they also described her as a highly capable oral advocate.

Third, Solicitor General Kagan possesses the maturity of judgment, integrity, independence and temperament required for service on the Supreme Court. Interviews reveal that Solicitor General Kagan was widely regarded as a highly effective Dean with a reputation for carefully considering various points of view before reaching a conclusion on a given issue. Indeed, the same praise follows her at every phase of her legal career. Numerous interviewees noted that as Solicitor General she was capable of rising above the interests of the various federal agencies and make a determination as to what would be beneficial for the government as a whole, while also discharging her duties to the Court. If there is one quality that was repeatedly raised in the interviews, it was her open-mindedness. We heard from multiple sources that she is not driven by ideological concerns, but rather is sensitive to the facts of each case. Those interviewed also commented that Solicitor General Kagan brought a certain humility to her work; she was repeatedly described as a “good listener” who fairly considered the arguments presented to her. We believe that Solicitor General Kagan’s frequently cited ability to listen, to internalize the arguments on all sides of an issue and to bring people of disparate viewpoints

¹⁶ Justice Black did spend a year as a police court judge early in his political career, but came to the Court from the U.S. Senate.

¹⁷ Three of the Chief Justices – Charles Evans Hughes, Harlan Fiske Stone and William Rehnquist – served as Associate Justices before becoming Chief Justice.

together will serve her and the Court well if she is confirmed, and may lead to her becoming a great Justice.

Fourth, Solicitor General Kagan clearly has an appreciation for the role of the Supreme Court as the final arbiter of the meaning of the Constitution. Her clerkship memos demonstrate that she gave careful consideration to each petition for *certiorari* and was reluctant to have the Supreme Court step in unless the issue had percolated sufficiently in the lower courts, and the case presented an important question of federal constitutional or statutory law that was ripe for review. Her testimony in her confirmation hearings for Solicitor General reinforces that view. While some reports have questioned Solicitor General Kagan's commitment to the protection of civil liberties, and expressed concerns more generally about the lack of information in the public record to assess her likely judicial philosophy, many who have worked closely with her expressed confidence in Solicitor General Kagan's understanding of the Court's important role in protecting the personal rights of individuals.

Finally, on the issue of her likely judicial philosophy, Solicitor General Kagan's record reveals a keen understanding of the constitutional limitations to judicial power and the importance of adherence to precedent to the legitimacy of the Court's actions. Her memos as a clerk to Justice Marshall at the start of her career, just as her arguments and briefs as Solicitor General, reveal an impulse to refrain from having the Court resolve significant legal issues prematurely or unnecessarily, and a gravitation to positions that hew closely to existing precedent and are tied narrowly to the facts of a case.

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Based on the work performed as set forth above, and considering the New York City Bar's evaluation guidelines and rating system, and having reflected on the complete factual picture presented by Solicitor General Kagan's candidacy, we conclude that Solicitor General Kagan is Highly Qualified to serve as an Associate Justice of the Supreme Court of the United States.