May 14, 2010

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Senator Sessions:

I write in support of Elena Kagan’s confirmation as an Associate Justice of the Supreme Court of the United States. I have known Elena for 27 years. We met as first-year law students at Harvard, where we were assigned seats next to each other for our classes. We were later colleagues as editors of the Law Review and as law clerks to different Supreme Court Justices; and we have been friends since.

Elena possesses a formidable intellect, an exemplary temperament and a rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments. Elena would also bring to the Court a wealth of experience at the highest levels of our government and of academia, including teaching at the University of Chicago, serving as the Dean of the Harvard Law School and experience at the White House and as the current Solicitor General of the United States. If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we will have reached a point where no capable person will readily accept a nomination for judicial service.

I appreciate that considerations of this type are frequently extolled but rarely honored by one side or the other when the opposing party holds the White House. I was dismayed to watch the confirmation hearings for then-Judge Alito, at the time one of our most distinguished appellate judges, and find that they ranged from the anodyne and uninformative to the utterly disgraceful. And one could readily identify members of the current Senate majority, including several who serve on the Judiciary Committee, who, when they previously assessed the judicial nominees of the other party, earnestly articulated many of the same objections that doubtless will be raised against Elena (such as a lack of judicial
experience, a perceived absence of a “paper trail,” or whether the nominee’s views truly are
in the legal mainstream). I respectfully submit that it brings no credit to our government, and
risks affirmative harm to our courts, when our elected representatives simply swap talking
points—emphasizing the same considerations they previously minimized or derided—only to
revert to their former arguments as soon as electoral fortunes turn.

Lest my endorsement of Elena’s nomination erode the support she should receive
from her own party, I should make clear that I believe her views on the subjects that are
relevant to her pending nomination—including the scope of the judicial role, interpretive
approaches to the procedural and substantive law, and the balance of powers among the
various institutions of government—are as firmly center-left as my own are center-right. If
Elena is confirmed, I would expect her rulings to fall well within the mainstream of current
legal thought, although on the side of what is popularly conceived of as “progressive.” This
should come as a surprise to exactly no one: One of the prerogatives of the President under
our Constitution is to nominate high federal officers, including judges, who share his (or her)
governing philosophies. As has often been said, though rarely by senators whose party did
not control the White House at the time, elections have consequences.

Elena Kagan is an impeccably qualified nominee. Like Louis Brandeis, Felix
Frankfurter, Robert Jackson, Byron White, Lewis Powell and William Rehnquist—none of
whom arrived at the Court with prior judicial service—she could become one of our great
Justices. I strongly urge you to confirm her nomination without delay.

Very truly yours,

Miguel A. Estrada

MAE/pl