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Klobuchar Opening Statement for Confirmation Hearing of Supreme Court Nominee Elena Kagan

Washington, D.C. – Below are U.S. Senator Amy Klobuchar's opening remarks as prepared for delivery for the Supreme Court confirmation hearing for Solicitor General Elena Kagan. In her opening statement today, Klobuchar will emphasize the importance of Solicitor General Kagan's "broad range of legal work" and "practical, real-world experiences."

"I, for one, would like to see someone who thinks very deeply about the consequences that legal choices and legal decisions have on regular people," Klobuchar said. "Additionally, Elena Kagan has had a lot of practical experience reaching out to people who hold very different beliefs, and that's increasingly important on a very divided Supreme Court."

Klobuchar plans to focus many of her questions on Solicitor General Kagan's background and judicial philosophy, as well as criminal justice issues.

Below is the full text of Klobuchar's remarks as prepared for delivery:

"Welcome, Solicitor General Kagan.

I know you have family and friends with you today, supporting you during this important hearing, and we welcome them too. I wish your parents could have lived to see their daughter nominated to the Supreme Court, but I know you know there are so many others who wish you well today.

We've heard a lot today about your work experience, as we should. But when I think about your broad range of legal work, and the practical real-world experience you've had, I'm reminded of the famous speech President Teddy Roosevelt gave 100 years ago this year. To paraphrase President Roosevelt:

It is not the critic who counts.... The credit belongs to the [one] who is actually in the arena. . . who strive[s] to do the deeds ... who spends [themselves] in a worthy cause; who at the best knows in the end the triumph of high achievement . . . and [whose] place shall never be with those cold and timid souls who neither know victory nor defeat.

Solicitor General Kagan, there are always a lot of critics on the sidelines, but you have actually been in the arena . . . as a manager, as a teacher, as an advisor, as a consensus-builder and as a lawyer. In every job you've had, you've worked very hard and done very well. That is why you are before us today, being considered – in the words of Teddy Roosevelt – for this “high achievement.”

Your work on the front lines tells me that you have practical experience thinking about the impact of laws and policies on the lives of ordinary Americans.

When you're involved in considering the nitty-gritty details of different policies... when you're actually in the game as a decisionmaker ... You have to figure out when to compromise and when to hold firm on a piece of legislation. You have to know exactly what the consequences of your recommendations will be. You have to think about the lives that will be impacted.

You were the first woman Dean of Harvard Law School. There, you were widely credited with bringing together a faculty that was rife with division.

Whether you were helping recruit talented professors to Harvard from across the political spectrum, or later, when you were working with senators from both parties on anti-tobacco legislation, you forged coalitions and found resolution between seemingly intractable parties.

It strikes me that it takes a pretty extraordinary person who, after working in the Clinton Administration, can still gets a standing ovation from the Federalist Society... who inspires a group of 600 law school students to show up for a rally wearing “I love Elena” t-shirts... who is widely credited with calming the factionalism that had previously roiled your law school. In several different jobs now, you have successfully managed lawyers, and worse yet, law professors – a group that can certainly be described as “fearless in the face of supervision”!

In sum, you've had a lot of practical experience reaching out to people who hold very different beliefs, and that's increasingly important on a very divided Supreme Court. That must be, by the way, why you have all the previous Solicitors General from the past 25 years – under both Democratic and Republican administrations – supporting you for this job.

You also spent years teaching students as a law professor. You understand how law school allows students to dig deep into the details of a case and to see the shades of gray.

I think those of us in Congress would do well to recall the spirit of law school more frequently.... To remember a time when it was our job to think through both sides of an argument and to give credence to the legitimate points for the other side. I believe that in

government today, people need to engage, rather than retreat to the opposite corners of the boxing ring.

This brings me to a story about my fellow Minnesotan, Justice Harry Blackmun. His oldest daughter gave him a copy of Scott Turow's classic book One L for his 70th birthday. As you know, it is a book about the first year of law school.

After reading the book, Justice Blackmun wrote a note to Scott Turow. He wrote, "Surely there is a way to teach law, strict and demanding though it might be, with some glimpse of its humaneness and basic good.... You so properly point out that there is room for flexibility and different answers, and that not all is black or white. If I ever learned anything on the bench," Justice Blackmun said, "it is that."

It seems to me, General Kagan, that in all the jobs you've had, you have carried this spirit of law school with you – the spirit of constant engagement and good-faith efforts to reconcile different views. We would welcome such traits on our Supreme Court.

I also see in you someone like your mentor and former boss, Thurgood Marshall – someone who thinks that the law is more than just an academic exercise.

I, for one, would like to see someone who thinks very deeply about the consequences that legal choices and legal decisions have on regular people.

For me, I would welcome a Justice who, in the Lilly Ledbetter employment discrimination case, would raise – like Justice Ginsburg did – some real-world points, like: "What was Lilly supposed to do to file her complaint on time? Run around asking male employees what they were making? Sneak into their desks to see their paychecks?"

I would also welcome a Justice who, in the Exxon-Valdez case, would have thought – as Justice Stevens did – about the real-world impacts of slashing the damages that the jury had awarded to the 32,000 fisherman whose livelihoods were tragically impacted by the Exxon Valdez oil spill of 1989.

While I do not know what you would have done in these cases, your practical experience leads me to believe you may have considered such things.

Now, even with the variety of legal experiences that you have had, questions have been raised as to whether it is appropriate to nominate someone to be a Supreme Court Justice who has never been a judge before.

As you know, more than one-third of all Supreme Court Justices throughout history didn't have prior judicial experience, including Chief Justice Rehnquist and Justices Brandeis and Frankfurter.

In an acknowledgement of the importance of your real world experience, Justice Scalia said recently that he was “happy to see that this latest nominee is not a federal judge – and not a judge at all.”

I think your practical experience will be helpful should you be confirmed to the Supreme Court, and I look forward to asking you more about that.

As a former prosecutor, I’m particularly interested in your approach to criminal law cases. When I was the Hennepin County Attorney, I saw firsthand how the law can impact the lives of real people – whether it’s crime victims and their families, or defendants, or the neighborhoods where people live and work. Of course, criminal justice cases that reach the Supreme Court involve complicated tradeoffs between competing values – safety, privacy, and liberty. I’d like to know more about how you expect to evaluate these issues.

And in criminal cases as well as civil cases, I’d like to know how you would balance the text of statutes and the Constitution with pragmatic considerations based on your real-world experience.

I often get concerned that pragmatic experiences are missing in judicial decision-making – such as when I looked at last year’s Supreme Court decision in *Melendez-Diaz* where a majority broadly interpreted the Confrontation Clause to include crime lab workers, creating potentially unwieldy and unnecessary requirements for prosecutors. I understand that during your tenure as Solicitor General, you filed a brief in a separate case with the Supreme Court that attempted to limit the holding of *Melendez-Diaz*, and I want to ask you about that.

Finally, I want to ask you about some First Amendment issues you’ve written about, like the *New York Times v. Sullivan* standard in libel cases.

As I consider your nomination, I also want to reflect on how far we’ve come: When Sandra Day O’Connor graduated from law school more than 50 years ago, the only offer she got from a law firm was for a position as a legal secretary.

Justice Ginsburg faced similar obstacles. When she entered Harvard in the 1950s, she was only one of nine women in a class of more than 500 and one professor actually asked her to justify taking a place that could have gone to a man.

I know you’re well aware of the strides that women have made. In a 2005 speech, quoting Justice Ginsberg, you described a 1911 student resolution at the University of Pennsylvania Law School. This resolution would have introduced a 25¢-per-week penalty on all students without mustaches!

The women who came before you to be considered by this Committee helped blaze a trail. And although your record stands on its own, you are also – to borrow a line from Isaac Newton – “standing on the shoulders of giants.”

In the course of more than two centuries, 111 justices have served on the Supreme Court. Only three have been women. If you are confirmed, you will be the fourth, and for the first time in its history, three women would take their places on the bench when arguments are heard in the fall.

Last year, at the confirmation hearings for Justice Sotomayor, I said I was looking for three things in a Supreme Court Justice: Good judgment, humility, and the ability to apply the law without fear or favor.

I'd like to add one additional consideration to the three standards I mentioned last year: I'd like to see a Supreme Court Justice who is able to go into the back room when the Justices meet – and when no “ordinary citizens” are present – and bring some real-world perspective to the room.

I'd like to see someone who wouldn't expect the victim in an employment discrimination case to go rifling through her male coworkers' desks to see what their pay stubs said. I'd like to see someone who wouldn't expect prosecutors to bring a crime lab analyst to every trial, even when the crime lab's findings aren't disputed.

This will be my focus at the hearing. I am hopeful that your background and experiences – to use the words of Teddy Roosevelt, the experiences of someone who has “actually [been] in the arena” – will help you be that person. I am hopeful that you will use your great skills and abilities to bring that commonsense perspective to the Court, and remember that the cases you hear involve real people – with real problems – looking for real remedies.

Thank you.”

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