

STATEMENT ON THE SENATE JUDICIARY COMMITTEE EXECUTIVE COMMITTEE
VOTE ON THE NOMINATION OF SOLICITOR GENERAL ELENA KAGAN

Senator Al Franken

Thank you, Mr. Chairman.

Mr. Chairman, I'm going to vote for General Kagan.

Because I think that General Kagan understands the place of the Supreme Court, and its relationship to the executive, to the legislature, and to the American people.

After decades of conservatives telling the American people that they have to beware of activist judges, that they have to beware of legislating from the bench, suddenly, conservatives are now saying there's really no such thing. They're saying that a judicial activist is just someone who rules in a way you don't like. That it's all in the eye of the beholder.

And on this point, General Kagan was a breath of fresh air.

My friend Senator Graham asked General Kagan for her definition of an activist judge. And she answered that an activist judge was someone who, quote, "doesn't take three principles to heart":

First, deference to the political branches in making the policy decisions of the nation. Second, respect for precedent. And third, deciding cases narrowly and avoiding constitutional questions.

I liked that definition. And I think a lot of other folks here did, too. And you know what? In case, after case, after case, the Roberts Court fit that definition of judicial activism to a “t”.

Just take *Citizens United*.

In *Citizens United*, the Roberts Court struck down two federal statutes, overturned two of its own precedents, and ruled on a broad constitutional question that the Court itself raised—and was never the grounds of an appeal. All to allow corporations basically unlimited spending in our elections.

Mr. Chairman, *Citizens United* fits all three parts of our definition of judicial activism. It is the hat trick of legislating from the bench. But it’s not just *Citizens United*. It’s *Gross*. It’s *Leegin*. It’s *Rapanos*. It’s 5-4 decision after 5-4 decision where corporate America wins and working Americans lose.

My friends, judicial activism exists—it’s alive and well. And I’m glad that General Kagan was candid enough to acknowledge it.

And at the Roberts Court, judicial activism has cut in favor of big business almost every time.

But General Kagan did more than just define activism. She did more than acknowledge that judicial activism exists.

She also said, repeatedly and clearly, that she would work to avoid it. That she would be a modest justice. Who will ask why Congress passed the statutes she is interpreting. And who won't ignore this body's intent.

General Kagan won't be the judge who ignores 100,000 pages of evidence that Congress prepares to justify a law—as the Roberts Court did in *Citizens United*.

She won't be the judge who reads statutory protections for workers so narrowly that they become meaningless—as the Rehnquist Court did in *Circuit City*.

She won't be a judge who legislates from the bench.

And so, as I said about then-judge Sonia Sotomayor, I believe that a vote for Solicitor General Kagan is a vote against legislating from the bench. A vote for judicial modesty. And a vote for the American people.

I applaud General Kagan's patience. I applaud her sagacity. I applaud her judicious demeanor. And I think she'll make a great Justice Kagan. Thank you, Mr. Chairman.