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Dear Mr. President:

I am writing because I think it very important that you view the vacancy created by Justice Souter's resignation as an opportunity to lay the groundwork for a series of appointments that will gradually move the Court in a pragmatically progressive direction. Neither Steve Breyer nor Ruth Ginsburg has much of a purchase on Tony Kennedy's mind. David Souter did, and it will take a similarly precise intellect, wielded by someone with a similarly deep appreciation of history and a similarly broad command of legal doctrine, to prevent Kennedy from drifting in a direction that is both formalistic and right-leaning on matters of equal protection and personal liberty.

If you were to appoint someone like Sonia Sotomayor, whose personal history and demographic appeal you don't need me to underscore, I am concerned that the impact within the Court would be negative in these respects. Bluntly put, she's not nearly as smart as she seems to think she is, and her reputation for being something of a bully could well make her liberal impulses backfire and simply add to the fire power of the Roberts/Alito/Scalia/Thomas wing of the Court on issues like those involved in the voting rights case argued last week and the Title VII case of the New Haven firefighters argued earlier, issues on which Kennedy will probably vote with Roberts despite Souter's influence but on which I don't regard Kennedy as a lost cause for the decade or so that he is likely to remain on the Court.

When Justice Stevens leaves, you might consider making a dramatic appointment of a political figure like Jennifer Granholm, about whom I must confess I know less than I'd like at the moment, or of someone like Kathleen Sullivan, who might well be worth fighting for in that crucial seat. For the Souter seat, I can't think of anyone nearly as strong as Elena Kagan, whose combination of intellectual brilliance and political skill would make her a ten-strike, if you'll forgive my reference to bowling. I've known and worked with her ever since she was my student and research assistant in the 1980s, have watched her become a scholar of the first rank and a star as a teacher, and have marveled at how skillfully she transformed a school that had long been considerably less than the sum of its parts into a vibrant and wonderful place for students to learn and for faculty to teach, write, and collaborate. Her techniques for mastering the substance of the many fields in which we have made important new faculty appointments during her tenure as dean and for gently but firmly persuading a bunch of prima donnas to see things her way in case after case — techniques she has deployed with a light touch and with an open enough mind to permit others to persuade her from time to time — are precisely the same techniques I can readily envision her employing not just with justices like Kennedy but even with a justice like Alito or, on admittedly rare occasions, with a justice like Scalia or Roberts.

It's easy to underestimate how much difference David Souter's analytical prowess and historical command have made within the Court over the past 19 years in shaping both the

language of other justices' opinions and on occasion their votes in important lines of cases. Elena Kagan seems to me uniquely suited to perform that task, and to perform it for the next thirty years or longer. Diane Wood — who is more powerful intellectually than Sonia Sotomayor or any of the others mentioned as plausible prospects at the moment with the sole exception of Kagan, who is even smarter — would be likely to serve nearly a decade less than Elena and doesn't appear to me to have the dynamic personality or the extraordinary diplomatic gifts for inspiring confidence and for moving others that have made Elena Kagan the best dean of any major law school in memory and certainly the best Harvard dean in the forty years I have spent on the faculty here.

I also think it's easy to forget how much difference the public face of the Supreme Court can make in advancing a humane and yet suitably cautious conception of the rule of law and the role of courts in the pursuit of justice. That's a facet of the Court's role to which few justices over our history have made much of a contribution, given the significant limits on what a sitting justice can suitably say in a public forum. Louis Brandeis, Earl Warren, and Robert Jackson might be cited as exceptions. David Souter certainly couldn't be credited with success in that role, although the conspicuous modesty of his personal style was a plus as far as it went. Elena Kagan would, however, combine that personal modesty with an appealing public persona and would project a well-grounded image of justice as fairness and of law as codified common sense. In that regard, I think it's clear that a Justice Kagan would be a much more formidable match for Justice Scalia than Justice Breyer has been — and certainly than a Justice Sotomayor or a Justice Wood could be — in the kinds of public settings in which it has been all too easy for Scalia to make his rigid and unrealistic formalism seem synonymous with the rule of law and to make Breyer's pragmatism seem mushy and unconstrained by comparison. It's important, I think, for the simultaneously progressive and yet principled, pragmatic and yet constrained, approach to law and justice that you have espoused, both during the campaign and in your public statements since becoming president, to be embodied in the person and voice of your first Supreme Court nominee. Elena Kagan would personify that approach and would ultimately be seen by the American public to exemplify it.

For all these reasons, I hope you will reach the conclusion that Elena Kagan should be your first nominee to the Court. And, if I might add a very brief personal note, I can hardly contain my enthusiasm at your first hundred days. I don't underestimate the magnitude of the challenges that remain, and I continue to hope that I can before too long come to play a more direct role in helping you meet those challenges, perhaps in a newly created DOJ position dealing with the rule of law, but my main sentiment at the moment is one of enormous pride and pleasure in being an American at this extraordinary moment in our history.

Wishing you all the best always,



The President
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