



Written by [Bob Adelman](#) on May 12, 2010

Supreme Court Nominee Elena Kagan: Clearly Opaque

When President Obama named Elena Kagan as his nominee for justice of the Supreme Court to replace retiring Justice John Paul Stevens, he said she “embodies that same excellence, independence, integrity and passion for the law” as did Justice Stevens. Obama said Kagan is “one of the foremost legal minds” in the country, and is “a trailblazing leader.”



As was immediately pointed out by [Conservative Action](#), the words “independence” and “trail-blazing leader” translate into “Liberal Judicial Activist.” Conservative Action then went on to offer rebuttals to various “talking points” the administration is using to promote her nomination:

Talking Point #1: Kagan “Is Main Street,” has “Real-Life Experience.” In actual fact, her background takes her from an upper middle class Brooklyn neighborhood to Princeton, to Oxford University, and then on to Harvard Law School.

Talking Point #2: Kagan is a “Moderate Liberal.” As a history major, Kagan investigated and then wrote about “Socialism’s decline,” and sympathized with those who “still wish to change America.”

[Paul Campos](#), professor at the University of Colorado in Boulder, said “Yesterday, I read everything Elena Kagan has ever published. It didn’t take long: in the nearly 20 years since Kagan became a law professor, she’s published very little academic scholarship — three law review articles, along with a couple of shorter essays and two brief book reviews ... She has somehow managed to spend her entire professional career cycling between the highest levels of legal academia and the federal government without taking a public stand on almost any controversial issue.”

Senator Jeff Session (R-Ala.), a ranking member of the Senate Judiciary Committee, added “Ms. Kagan’s lack of judicial experience and short time as Solicitor General, arguing just six cases before the [Supreme] Court, is troubling. The public expects Supreme Court nominees to possess a mastery of the law, a sound judicial philosophy, and a demonstrated dedication to the impartial application of the law and the Constitution. With no judicial opinions to consider, it will be especially important that other aspects of her record exhibit these characteristics.”

Such “other aspects” include her challenge, while Dean of Harvard Law School, to the federal law requiring equal access to campuses for military recruiters. She denied recruiters access to the campus because of her opposition to the government’s ban on homosexuals openly serving in the military, specifically the “don’t ask, don’t tell” rule adopted during the Clinton Administration. When the Supreme Court heard the case, Kagan’s position was unanimously rejected, 9-0. This was enough for Senator James Inhofe (R-OK) to announce that he would vote against her nomination, stating that “her



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lack of judicial experience and her interpretation of the Constitution” as well as that decision made while dean at Harvard Law School, all “demonstrated poor judgment.”

When Kagan presented the government’s position in the case of *Citizens United v. Federal Election Commission*, reviewed carefully [here](#), her argument that the government could prohibit political speech by corporations was also rejected by the court, and received a blistering response by Chief Justice John Roberts who said, “When government seeks to use its full power, including criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses *censorship to control thought* [emphasis added]. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”

David Hudson, [wrote this for](#) the First Amendment Center:

[I]n *United States v. Stevens* (2010), President Barack Obama’s new nominee for the Supreme Court seat of retiring Justice John Paul Stevens defended the constitutionality of a very broad law that criminalized the depiction of animal cruelty. Kagan argued in the government’s brief that speech was entitled to no First Amendment protection if its harms outweigh its benefits: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As Mark Tapscott [commented](#), “if the Court had accepted her position, it would have effectively repealed the First Amendment’s protection of speech and replaced it by granting government the authority to decide what speech should be permitted.”

Opposition to Kagan’s nomination also came from [CatholicVote.org](#). In a recent letter to its members, it outlined some “key facts you should know about her, “ including: 1) Ms. Kagan has NO experience as a judge; 2) she is an aggressive advocate of abortion; and 3) she authored a memo arguing that virtually all federal funding should be excluded from programs offered by religious organizations.”

Even the liberal *Salon* magazine [presented](#) “The Case Against Elena Kagan” holding that Kagan is not liberal enough.

The prospect that Stevens will be replaced by Elena Kagan has led to the growing perception that Barack Obama will actually take a Supreme Court dominated by Justices Scalia (Reagan), Thomas (Bush 41), Roberts (Bush 43), Alito (Bush 43) and Kennedy (Reagan) and move it further to the Right. Joe Lieberman went on Fox News this weekend to celebrate the prospect that “President Obama may nominate someone in fact who makes the Court slightly less liberal,” while The Washington Post’s Ruth Marcus predicted: “The court that convenes on the first Monday in October is apt to be more conservative than the one we have now.” Last Friday, I made the same argument: that replacing Stevens with Kagan risks moving the Court to the Right, perhaps substantially to the Right (by “the Right,” I mean: closer to the Bush/Cheney vision of Government and the Thomas/Scalia approach to executive power and law).

David French of [National Review](#) was able to find some positives in the Obama nomination: “I’m not naïve. I know that Elena Kagan is liberal. Most likely, she will fiercely defend legalized abortion, and I suspect that I’ll frequently disagree with her rulings. However ... she brought in several outstanding conservative scholars to Harvard Law School and was a well-known friend of the campus chapter of the [conservative] [Federalist Society](#).”

And an editorial in the [Orange County Register](#) concluded that “Kagan is not as far to the left as some of the other names thought to be on the president’s short list. Her appointment is not ideal, but Kagan



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might just be a centrist — the best anyone could hope for from a president who has governed from the far left.”

The Senate will likely give its “advise and consent” to the nomination by the end of the summer, despite objections from some Republicans. Where the Supreme Court goes from there is an open question, thanks to Kagan’s lack of experience, paucity of written opinions on public issues, and her resulting opacity.

Photo: Solicitor General Elena Kagan is introduced as President Obama’s choice for Supreme Court Justice in the East Room of the White House on May 10, 2010: AP Images



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