

SCOTUSblog Briefing Paper

Elena Kagan – Working with Conservatives and Libertarians

June 18, 2010

I. Summary and Our Take

Elena Kagan's tenure as dean of the Harvard Law School was perhaps most marked by the perception by conservatives that they were a more welcome part of the academic community. That was true of both conservative faculty members – who saw their ranks expand and who felt a greater level of respect – and conservative students.

Kagan took steps to improve ideological and intellectual diversity at Harvard Law School. She made substantial changes to the Harvard Law school faculty, hiring forty-three new members and increasing the full-time professors from eighty-one to over a hundred. Three of those hires (Jack Goldsmith, John Manning, and Adrian Vermeule) are well-known conservatives. The number of conservative hires was not large, but their prominence was very significant.

Kagan was also well-regarded by the conservative Federalist Society. Though she made clear that she did not share their views, she equally made clear her respect.

In her public statements, Kagan showed her respect for Justice Scalia's jurisprudence and publicly supported Bush judicial nominees Michael McConnell and Peter Keisler. In turn, several prominent conservatives, including Miguel Estrada and Charles Fried, have provided strong endorsements of Kagan's nomination. (As mentioned in a previous SCOTUSblog [post](#), Estrada's endorsement of Kagan is most notable and has the potential to swing Republican votes.)

In nominating Kagan, President Obama drew special attention to the prospect that she would be a consensus builder on the Court. Implicit in the Obama administration's focus on consensus-building is the hope that, like Justice Stevens, Justice Kagan will be able to move some of her colleagues (especially Justice Kennedy) to the left on major issues.

We think it very unlikely that in the first few years Kagan can approach the level of influence of Justice Stevens, who had the distinct benefit of seniority and his longstanding professional relationship with his colleagues. While the support of Kagan's conservative friends and colleagues may play a significant political role in securing her confirmation, it indicates little regarding her future intellectual influence or personal/professional relations with her

conservative colleagues. As a consequence, the Court is likely to continue to move further to the right with Stevens' departure.

Kagan's greatest short-term strength in building coalitions is likely to be found not in changing the views of her colleagues, but instead in identifying grounds for compromise. That is a skill in which she has excelled.

II. The Relevant Source Materials

A. [Remarks by President Barack Obama at the nomination of Elena Kagan to U.S. Supreme Court](#) (May 10, 2010)

- “But Elena is respected and admired not just for her intellect and record of achievement, but also for her temperament -- her openness to a broad array of viewpoints; her habit, to borrow a phrase from Justice Stevens, “of understanding before disagreeing”; her fair-mindedness and skill as a consensus-builder. These traits were particularly evident during her tenure as dean. At a time when many believed that the Harvard faculty had gotten a little one-sided in its viewpoint, she sought to recruit prominent conservative scholars and spur a healthy debate on campus. And she encouraged students from all backgrounds to respectfully exchange ideas and seek common ground -- because she believes, as I do, that exposure to a broad array of perspectives is the foundation not just for a sound legal education, but of a successful life in the law.”

B. **Notable conservatives professors hired at Harvard Law School under Kagan's deanship**

- [Jack Goldsmith](#) (HLS [Press Release](#), Harvard Crimson [article](#))
- [John Manning](#) (HLS [Press Release](#), Harvard Crimson [article](#))
- [Adrian Vermeule](#)

C. **Kagan's public support/praise for conservative Justices and judicial nominees**

- Introducing Justice Antonin Scalia
 - In introducing Scalia, Dean Elena Kagan '86 referred to him as “[a] giant in the Law,” and praised his jurisprudence, which in her view will be regarded as “one of the most significant products ever in American Law.” ([HLS Record](#), Oct. 2, 2008)
 - “I think [Scalia] is the justice who has had the most important impact over the years on how we think and talk about law, whether we agree or disagree with his positions...[He has] transformed the very terms of legal debate in this country.” ([HLS Record](#), Nov. 30, 2006)
- Introducing Justice Anthony Kennedy

- “In fact, what Justice Kennedy has done, time and time again, in each and every case, is to think for himself. He probes, he questions, he tries to determine – putting aside any preconceptions or prejudices – which side of a dispute is truly right. One might make the claim, radical though it may sound to certain ears, that is precisely what a responsible judge should do – that his is indeed the very essence of the judicial craft and the judicial role. I’ll say again: independence and integrity. They are, in my view, the most important qualities of a judge, and they are held in abundance by Justice Kennedy.” ([Alumni luncheon](#), Oct. 28, 2006)
- [Letter of recommendation](#) from Kagan (and others) for Bush judicial nominee Peter Keisler (Apr. 13, 2001)
- [Letter of recommendation](#) from Kagan for Bush judicial nominee Michael McConnell (Sept. 10, 2002)
 - “[T]he letters do provide a window into the tight-knit legal community from which Kagan came -- in which politics is passé, and members are supportive of one another regardless of ideology. Indeed, during various confirmation battles of her own, Kagan was reciprocated with letters of endorsement and support from high-profiled legal conservatives like Bush appointees Miguel Estrada and Jack Goldsmith. Perhaps more important to the current climate, the letters provide clues as to what kind of Justice Kagan would be: more consensus builder than ideologue; someone who, as one well-seasoned court observer put it, would bridge sides and likely end up being ‘the most important vote.’” ([Huffington Post](#), Apr. 29, 2010)

III. Prominent peers/colleagues who have endorsed Kagan

- [Miguel Estrada, Partner – Gibson Dunn](#)
 - “Her tenure as Dean demonstrates that she is a uniquely gifted administrator – someone who can create consensus even in an institution that had become notorious for its fractiousness. For good measure, she has worked tirelessly to bring intellectual diversity to an institution that for too long had too little of it. I can personally attest, from my service on Harvard’s Board of Visitors, that Elena has significantly changed the place for the better.” ([Letter to Sens. Leahy and Specter in support of Kagan for Solicitor General](#) (Jan. 21, 2009))
 - See also [Estrada’s letter of endorsement of Kagan for Associate Justice](#) (May 14, 2010)
- [Charles Fried, Professor, Harvard Law School](#)

- “No, what it all tells us is that she came to Harvard Law School at a critical time in its history and determined that it was her job to make the biggest, richest, and most famous law school in the world also the best. And that she would do it by recruiting excellent teachers from across the ideological spectrum. That she would make students with every point of view feel as if they were part of an intellectual and professional enterprise. That the students and faculty should feel this was not just a place to come to work and an experience to be endured, but an enjoyable and satisfying part of a life that should be satisfying and enjoyable in its entirety. She saw that was her job; that was her role. She threw herself into it wholeheartedly. And she succeeded.” ([The New Republic](#), Apr. 19, 2010)
- [Fried’s letter in support of Kagan for Solicitor General](#) (Jan. 21, 2009)
 - (1) “[Kagan] showed an ability to put aside disagreements with a candidate’s political or intellectual disposition and to see only the quality of the candidate’s intellectual ability and potential contribution. The result has been the most vibrant and intellectually diverse faculty I have know [*sic*] since coming to the Harvard Law School in 1961.”
- [Kenneth Starr, President – Baylor University](#)
 - (1) Calls Kagan a great community builder and slams conservative criticism – ([MSNBC \(video\)](#))
- [Judge Michael McConnell, Director – Stanford Constitutional Law Center](#)
 - (1) Kagan has “had a remarkable and truly unusual record of reaching out across ideological divides.” ([USA Today](#), May 14, 2010)
- [Lawrence Lessig, Professor – Harvard Law School](#)
 - (1) “For the core of Kagan’s experience over the past two decades has been all about moving people of different beliefs to the position she believes is correct. Not by compromise, or caving, but by insight and strength. I’ve seen her flip the other side. Those were the reports of her work inside the Clinton administration (Clinton’s nickname for her: ‘Judge’). Many describe her success at remaking a radically diverse law school (the Harvard I’ve returned to is not the Harvard I left). I’ve seen her earn the respect of people who disagree with her, and not by either running to a corner to pontificate, or by caving on every important issue.” ([Huffington Post](#), Apr. 26, 2010)

II. Criticism of Kagan’s hiring at Harvard from the left and right**A. [Ed Whelan](#), President – Ethics and Public Policy Center**

- “Elena Kagan is said to be an amazing consensus-builder and to deserve credit for Harvard law school’s hiring of three or four conservative professors. But when her hiring record as dean is criticized on racial-diversity grounds—no blacks or Hispanics among the 29 faculty hires while she was dean—suddenly she’s not responsible: The White House ‘emphasizes that Kagan did not have the final say in hiring at Harvard, where such decisions are made by committee.’” ([National Review](#), May 12, 2010)
- “It’s far from clear that her consensus-building skills will transfer to the court. As dean of Harvard Law School, Kagan had ample resources to use to win support and to make everyone happy. She won’t have those resources as a junior justice. Justice Kennedy may also find insulting the notion that she can so easily sway him.” ([NPR](#), May 10, 2010)

B. [Glenn Greenwald](#), Columnist and Blogger – Salon.com

- “Leaving aside the obvious fact that hiring a bunch of right-wing professors is not even remotely evidence of one’s ability to craft judicial opinions that attract conservative judges, is Kagan’s having pleased conservatives by hiring hordes of white, male, right-wing Professors really something that is considered a great feather in her cap? Isn’t it the opposite? How can any progressive possibly defend the hiring practices which Professor [Guy-Uriel] Charles documents and condemns? Yes: if you become Dean of a major law school and then proceed to hire bunches of right-wing Professors (while lavishing Bush lawyers you hired, such as Jack Goldsmith, with intense praise despite his formal approval of Bush’s illegal NSA program), then conservatives will like you. I agree with Professor Charles that ideological diversity is a desired goal for academic institutions and have no problem with (but rather applaud) her having done that. But if that was accomplished through hiring practices which progressives in every other context vehemently condemn, shouldn’t that be close to a deal-breaker when it comes to putting her on the Supreme Court, of all places: the branch of government designed to protect the powerless and marginalized minorities when their rights are being trampled upon by the majority and the powerful?” ([Salon](#), Apr. 27, 2010)

C. [Wendy Long](#), Counsel – Judicial Confirmation Network

- “Only 3 out of the 43 professors Kagan hired are conservative- or libertarian-leaning: Jack Goldsmith, John Manning, and Adrian Vermeule. That means only 7% of Kagan’s faculty hires were conservatives. Not exactly a huge percentage. Overall, the Harvard Law faculty only has, at most, 8 conservative- or libertarian-leaning professors. They are: Charles

Fried, Mary Ann Glendon, Allen Ferrell, Einer Elhauge, Hal Scott, plus Goldsmith, Manning, and Vermeule.” ([NRO Bench Memos](#), May 21, 2009)

- See Dan Markel’s response on [PrawfsBlawg](#) (May 23, 2009) as well as his more recent [post](#) (May 9, 2010) on the same topic.

III. News Sources

NPR, [Can Kagan Bridge a Divided Court? Consensus is No](#) (May 11, 2010)

TIME, [Elena Kagan, Supreme Court Nominee: Consensus Builder?](#) (May 14, 2010)

Bloomberg, [Kagan’s Bridge-Building Boosts her Supreme Court Candidacy](#) (Apr. 15, 2010)

Christian Science Monitor, [Elena Kagan as a Supreme Court Consensus builder?](#) (May 10, 2010)

Slate, [Obama Shouldn’t Try to Pick a Persuasive Justice](#) (May 7, 2010)

Harvard Crimson, [Elena Kagan’s Management Style Amped Up Pressure at Harvard Law School](#) (May 14, 2010)

American Prospect blog, [Kagan and Consensus-Building](#) (May 11, 2010)

AP (via Huffpost), [Elena Kagan’s Conservative Friends Voice Support](#) (May 14, 2010)

New York Times, [No Vote-Trading Here](#) (May 14, 2010)

WSJ, [Grading Kagan as a Dean](#) (May 12, 2010)

NPR, [At Harvard, Kagan Won More Fans than Foes](#) (May 18, 2010)

NRO Bench Memos, [The Myth of Kagan and the Conservatives](#) (May 21, 2009)

The Atlantic, [Conservatives for Kagan](#) (June 11, 2010)