

SCOTUSblog Briefing Paper

Elena Kagan – Diversity Hiring

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I. Summary and our take

In an April 22 blog [post](#), Duke University law professor Guy-Uriel Charles took issue with Elena Kagan’s record on racial and gender diversity hiring during her tenure as Dean of Harvard Law School. Since then, Kagan’s diversity hiring record has been a topic of discussion in the nomination debate.

During Kagan’s tenure as Dean, Harvard hired forty-three permanent, full-time faculty members. Of the thirty-two who were tenured and/or tenure-track, twenty-five were white men, six were white women, and one was an Asian-American woman. Of the eleven non-tenure track hires, six were white men, two were women, and three were minority men.

The White House, in a [memo](#), objected to the statistics cited by Charles as “misleading,” including because they addressed only hires and did not take into account offers made to minority and women scholars.

Charles and other critics challenge claims by some Kagan supporters that her hiring of prominent conservative professors demonstrates her potential as a consensus-builder on the Court. Her limited hiring of minority and women faculty members, they argue, similarly might reflect a potential bias against, or lack of sensitivity toward, the pursuit of minority and gender equality if she became a Justice.

In response to critics, three prominent African-American law professors from Harvard – Charles Ogletree, Randall Kennedy, and Ronald Sullivan (two of whom have known her for a quarter-century, and one of whom chaired the faculty committee that hired her) – wrote to defend Kagan and praise her active commitment to diversifying both Harvard’s faculty and its student body. We are unaware of any contrary claims on this matter by anyone on Harvard’s faculty.

As stated in a previous [post](#), the articles by Ogletree, Kennedy, and Sullivan are impressive both because they accept the premise of critics who argue that expanding faculty diversity is important, and because they confirm, based on close personal observation, that Kagan actively pursued that goal in practice. They discuss particular hires and promotion decisions, specifically discuss Kagan’s philosophical commitment to diversity in faculty hiring, and broadly document her role in expanding opportunity at Harvard.

They also address a key limitation on the power of the Dean: the Dean can effectively block a faculty appointment, but she cannot mandate a specific faculty appointment.

Martha Minow, who succeeded Kagan as Dean at Harvard, and Joseph Kearney, a conservative legal scholar and the Dean at Marquette University Law School, agree that “no [D]ean can wave a magic wand and hire anybody at a law faculty.” Kearney notes that “it is not the case that the dean of a law school has exclusive or even near exclusive control over the appointments process.” It should be noted, however, that this fact to some extent undercuts the claim by Kagan’s supporters that she deserves credit for the hiring of conservative faculty members.

Like almost every university, Harvard has a long way to go before it effectively resolves long-term dilemmas surrounding issues of inequality and diversity in faculty hiring. However, there is little evidence that Elena Kagan, as Dean, failed to address those concerns, or that the data on hiring patterns at Harvard Law School suggest a bias that could affect her sensitivity to the needs of under-represented minorities as a Supreme Court Justice.

Republicans may look to score political points by addressing this issue, but they will likely focus on other lines of attack more directly related to how Kagan might resolve legal questions. Democratic Senators will likely choose not to seriously attack their own party’s nominee on a bedrock liberal issue, thereby giving fodder to the opposition or encouraging further criticism from the left.

II. Relevant source materials related to Kagan’s hiring record as Dean of Harvard Law School (2003-2009) and as Solicitor General (2009-2010)

- “In the nearly six years that Ms. Kagan was dean, from 2003 to 2009, she hired a total of permanent, full-time faculty members, 32 of whom were tenured and tenured-track. Of those, 25 were white men, 6 were white women and one was an Asian-American woman. Of the other 11, 6 were white men, 2 were women and 3 were minority men (2 black and one Indian), according to a law school official.” ([New York Times](#), May 13, 2010)
- “Four-out-of-every five hires to its faculty were white men. She did not hire a single African American, Latino, or Native American tenured or tenure track academic law professor. She hired 25 men, all of whom were white, and seven women, six of whom were white and one Asian American. Just 3 percent of her hires were non-white.” ([Salon](#), May 7, 2010)
- Total Visiting Professor Offers Approved by the Lateral Appointments Committee to Minorities and Women, 2003-2009 (Kagan’s Deanship)

	Offers Approved	Percentage to Minorities	Percentage to Women
2003-2004	30	13.3%	26.6%
2004-2005	24	20.8%	37.5%
2005-2006	59	13.5%	28.9%

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2006-2007	63	17.5%	26.9%
2007-2008	67	17.9%	32.8%
2008-2009	13	23.1%	30.1%

White House “[Talking Points](#)“ Memo responding to the April 22 blog post by Professor Charles

- “Justice Department spokeswoman Tracy Schmalzer added that Kagan’s hiring record as Solicitor General ‘reflects a strong commitment to hiring qualified candidates of all races and genders.’ According to the department, Kagan’s hires since March 2009 have included one white man, three white women, one Asian man and one Indian man.” [Washington Post](#), May 12, 2010)

III.

A. [Guy-Uriel Charles](#), columnist and blogger – [Salon.com](#)

- “One of Kagan’s purported qualifications for the Supreme Court is that she is a consensus builder. The chief evidence for that contention is that she broke the hiring logjam at Harvard and made it possible for Harvard to hire conservatives. It might sound absurd to some, but I will accept the point that one of Kagan’s chief selling points is that she assured that Harvard did not discriminate ideologically. I am personally gratified that Harvard Law School is not closed to conservative faculty members. I support ideological diversity and would not want to see qualified individuals discriminated against on the basis of ideology.” ([Colored Demos](#), Apr. 22, 2010)
- “But what about people of color? How could she have brokered a deal that permitted the hiring of conservatives but resulted in the hiring of only white faculty? Moreover, of the 29 32 new hires, only six seven were women. So, she hired 23 25 white men, 5 six white women, and one Asian American woman. Please do not tell me that there were not enough qualified women and people of color. That's a racist and sexist statement. It cannot be the case that there was not a single qualified black, Latino or Native-American legal academic that would qualify for tenure at Harvard Law School during Elena Kagan's tenure. To believe otherwise is to harbor troubling racist views.” ([Colored Demos](#), Apr. 22, 2010)
- “Third, what is the justification for putting someone on the Supreme Court without a demonstrated commitment to opening barriers for women and people of color? Kagan’s performance as Dean at Harvard raises doubts about her commitment to equality for traditionally disadvantaged groups. I am eager to be convinced that she is committed to full equality for marginalized groups, but I’d like to see the evidence. Moreover, what

other questions would we have about Kagan if we knew more about her and her views?” ([Colored Demos](#), Apr. 22, 2010)

B. [Guy-Uriel Charles](#), [Anupam Chander](#), [Luis Fuentes-Rohwere](#), and [Angela Onwuachi-Willig](#), Law Professors

- “For those who think that more women and minorities qualified to serve on the Harvard Law faculty were simply nonexistent, one need only look at Harvard’s primary rival--Yale Law School. There Dean Harold Koh led the law school during almost the same period (Dean Koh, from 2004 to 2009, and Dean Kagan, from 2003 to 2009). Dean Koh hired far fewer faculty members--just ten--but he still managed to hire nearly as many women (5 of 10 at 50 percent), and just as many minorities (1 of 10 at 10 percent) as Dean Kagan.” ([Salon](#), May 7, 2010)
- “The question raised by Kagan’s hiring record is quite simple: what accounts for it? The inevitable conclusion is that gender and racial equality was not a pressing agenda for then-Dean Kagan. To this way of thinking, it does not matter if you don’t hire people of color and it does not matter if you only hire one-in-five women because no one is going to care. A commitment by a dean to hiring women and people of color in tenure and tenure-track positions often takes courage and conviction. It is reflective of one’s core commitments that all opportunities must be made available without regard to race and gender and a willingness to fight for that commitment. It reflects the fact that you are willing to visibly take a stand -- to risk something.” ([Salon](#), May 7, 2010)

C. [Sherrilyn Ifill](#), professor – University of Maryland School of Law

- “It’s apparent that the White House took Charles’ challenge seriously. The White House last week released information designed to counter the critique of Kagan’s diversity record. But as Charles, joined by law professors of color Angela Onwuachi-Willig, Anupam Chander and Luis Fuentes-Rohwer point out in a response published in Salon showing that Kagan hired a number of visiting professors of color, doesn’t answer why the coveted, permanent positions with the promise of tenure, were never filled by professors of color. In other words, Kagan still has some explaining to do. And her answers to this set of questions will resonate powerfully within the legal academy, where questions of diversity and hiring at the most prestigious law schools in the country continue to roil faculties.” ([The Root](#), May 10, 2010)
- “It’s likely that in the next few days one or more professors at Harvard--I would bet on African-American professor Randall Kennedy--will themselves pen a prominently placed piece designed to counter challenges to Kagan’s diversity hiring record. But behind the scenes, Obama’s team

will be working furiously to tamp down calls for Kagan herself to respond to this concern, which is one that may resonate well with those on the left who already fear that Kagan is too “safe” to make a real difference on the Supreme Court.” ([The Root](#), May 10, 2010)

D. [Glenn Greenwald](#), columnist and blogger – Salon.com

- “Whatever one thinks of the need for diversity in hiring, the view that it is a very important value is one of the most central and accepted planks in progressive politics. As Professor Charles asks, from this perspective, what could possibly justify the Dean of Harvard Law School’s hiring 29 tenured faculty members, 23 of whom were white males (79.3%) and only 1 of the 29 someone who is not white? These questions are particularly pressing because it is Kagan’s hiring practices at Harvard that is the most frequently cited evidence of her alleged ability to bridge differences with conservatives; indeed, that’s the aspect of her record which Lessig most aggressively touts. 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 Charles documents and condemns?” ([Salon](#), Apr. 27, 2010)
- “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)

E. [Roland Martin](#), analyst – CNN

- “If a white Republican president of the United States appointed a white male as his next Supreme Court justice, and upon the inspection of his record, it was discovered that of the 29 full-time tenured or tenured track faculty he hired as dean of Harvard Law, nearly all of them were white men, this would dominate the headlines.” ([CNN.com](#), May 10, 2010)

- “The real issue will be reaction from the left. It is shameful and disgusting when civil rights organizations, feminist groups and others lose their conviction and sense of purpose when a Democrat gets in the White House. They need to decide what matters: their principles or their politics; their mission or their liberal money; their convictions or chicken dinners in the White House.” ([CNN.com](#), May 10, 2010)

F. [Roger Clegg](#), president and general counsel – Center for Equal Opportunity

- “But providing this reassurance is a tricky enterprise for the administration, since for the civil-rights groups in question a commitment to diversity requires a willingness to discriminate on the basis of race, ethnicity, and sex in order to reach politically correct results (i.e., quotas). And if, as dean and as solicitor general, a lawyer like Kagan had this commitment, one of two things must be true: (a) She thinks such discrimination is perfectly legal, or (b) she knows it isn’t legal but is willing to break the law. If the answer is (b), then she is ethically unfit to be a justice; if the answer is (a), then it follows she will be willing to uphold such discrimination as a justice.” ([National Review Online](#), May 12, 2010)

IV. Response to the critics

A. [Charles Ogletree](#), professor – Harvard Law School

- “Throughout my time here, I have watched Dean Kagan work to address the issue of faculty diversity. As dean, she was quite responsive in trying to push more diversity on the Harvard Law School faculty and student body. While some have criticized the fact that many white males were hired at the law school, Dean Kagan was very supportive of women and men of color, including making sure that the faculty offered tenure to Professor Ken Mack and supported the appointment of Guhan Subramanian, a South Asian law professor, and Jeannie Suk, an Asian American woman.” ([The Root](#), May 12, 2010)
- “Dean Kagan pushed the faculty to extend appointments to African American and Latina some of whom chose to remain at their respective institutions rather than accept a position at Harvard Law School. We also have current candidates under consideration for tenured appointments who were visiting scholars at Harvard Law School during Elena Kagan’s deanship.” ([The Root](#), May 12, 2010)
- “Additionally, she was quite instrumental in creating a generation of diverse practicing lawyers who would accept clinical appointments at Harvard Law School. Among them were Ron Sullivan, who followed my career at Harvard and worked as the director of the Public Defender

Service, accepted an appointment at Yale Law School where he received a teaching award, and now has replaced me as the director of the Criminal Justice Institute, a program I started at Harvard Law School during the deanship of Robert Clark. Dean Kagan also appointed Brian Price, an African American, who is the director of Harvard’s transactional law clinic, and Ashish Nanda, a South Asian professor who runs Harvard Law School’s executive education program.” ([The Root](#), May 12, 2010)

B. [Randall Kennedy](#), professor – Harvard Law School

- “First, it is mistaken to suggest, as some have, that the Dean of Harvard Law School is responsible for all that happens or does not happen with respect to hiring. The Dean is the single most influential member of the faculty. One does not get hired at the law school without the Dean’s blessing. At the same time, the Dean does not have the power on her own to hire someone to the faculty. To be hired, a candidate must receive at least a majority, usually a super-majority, of votes. The Dean can seek to persuade, but the Dean at Harvard Law School cannot force professors to move when it comes to faculty hiring, traditionally the most contentious arena of struggle at a famously contentious institution.” ([Huffington Post](#), May 12, 2010)
- “Second, Kagan was attentive to issues of race in faculty hiring. I say this on the basis of what I observed as the Chair of the Harvard Law School’s Entry Level Appointments Committee, a Committee on which, as Dean, Kagan also sat. I often agreed with her assessments of candidates but sometimes disagreed. Even when I did disagree, however, I found her judgments to be eminently sensible. She evaluated candidates carefully and generously, deploying her tough-minded independence but also paying close attention to the opinions of her colleagues.” ([Huffington Post](#), May 12, 2010)
- “Now, to be sure, Kagan’s number one concern was always this: will hiring a given candidate best advance the educational mission of the Harvard Law School. That question often proved difficult to answer given the need to balance all sorts of considerations: short-term and long-term curricular needs, the promise of candidate A versus the accomplishments of candidate B; the relative strength of the cadre of candidates in certain fields versus the relative weakness of the cadre of candidates in other fields.” ([Huffington Post](#), May 12, 2010)
- “In answering that difficult question, Kagan was attuned to the various roles that faculty members play in academic life, the various careers that students pursue, and the various methodologies that scholars use to illuminate legal issues. She was also attuned to the ways in which systemic social inequities, reinforced by inertia, have slowed or even

stymied the movement of racial minorities into legal academia. Aware of this problem, she sought to increase the pool of minority candidates available for serious consideration for faculty positions at the nation's law schools. Her attentiveness to this issue was manifested in at least two important ways." ([Huffington Post](#), May 12, 2010)

C. [Ronald Sullivan](#), professor – Harvard Law School

- "I am an African-American law professor at Harvard who was recruited by Elena Kagan during her deanship. I use the word "recruited" decidedly. The dean does not "hire" any professor at Harvard; rather, the faculty votes on prospective members. To be sure, the dean's role in the hiring process is critical, but she alone cannot hire anyone." ([theGrio](#), May 13, 2010)
- "At the time of my appointment, then-Dean Kagan aggressively recruited me and, in the end, persuaded me to leave my professorship at the Yale Law School in favor of Harvard. How did she do this? Kagan offered me the directorship of the prestigious Harvard Criminal Justice Institute, the nation's preeminent teaching and research institute on criminal law, and the directorship of Harvard's Trial Advocacy Workshop, a nationally-known teaching program that brings in some of the country's top lawyers and judges to train Harvard law students during an intensive three week trial skills workshop. I can report that Elena Kagan used every bit of her discretionary authority to make the offer to come to Harvard far too attractive to turn down." ([theGrio](#), May 13, 2010)

D. [Martha Minow](#), dean (current) - Harvard Law School

- Minow: "I would absolutely underscore as a brand new dean would-- Joseph said no dean can wave a magic wand and hire anybody at a law faculty, and it's not by accident that the job is often described as herding cats. Having said that, a dean does have an important role in setting agendas and also in being a spokesperson in faculty meetings and committee meetings. I had the privilege of seeing Elena Kagan in action in both of those contexts, that is in committee meetings and faculty meetings. And as to all kinds of diversity—and that includes ideological, racial, gender, methodological, disciplinarity—she actually was a huge advocate of diversity, with a wide appreciation of the excellences that come in many different forms. I think that the ideological diversity question simply produced more national attention and attention in the law school world because it was a bigger change from what Harvard had been previously. As to hiring people of color and women, she made those priorities as well, consistent with, of course, the standards of excellence at the school [Harvard Law School] and pursued what many deans understand well is the tact of trying to increase the pool as well as trying to make ultimate

hires, because in all of these areas that's an important task as well. While she can't receive 100 percent credit for any changes in the hiring practice, she can receive real credit for changing the agenda and actually making sure that people did get hired at Harvard and at some other places.” ([Politico](#), June 16, 2010)

E. [Joseph Kearney](#), dean - Marquette University Law School

- Kearney: “I have not suggested that there should be any merit or demerit with respect to all aspects of the appointments process when Elena Kagan was Dean of Harvard Law School. I do want to note before I go further that it is not the case that the dean of a law school has exclusive or even near exclusive control over the appointments process. It is very largely in most places a faculty-driven process, and that is why what she did at Harvard Law School was so impressive, because she was not only able to create particular results but to engage her colleagues with respect to the point on which I did give her positive points because it's the one with which I'm familiar. I think that her having sought to ensure that the faculty was representative of mainstream legal thought in a broader way that was not true before she became dean was a pretty powerful matter.” ([Politico](#), June 16, 2010)

F. [Dan Markel](#) – professor - Florida State College of Law

- “In sum, taking credit or blame for faculty hiring is a bit like Presidents taking too much credit or blame in the managing of the economy. Senators (or citizens) should not think that Kagan's potential merits as a Justice are diminished in any substantial way on the grounds of the faculty hired during her tenure as dean. Problems in faculty hiring are the product of a 'they,' not a she. (Conversely, if Kagan were to trumpet her faculty hiring as an achievement that redounds only to her credit, such claims should be also dismissed.)” ([PrawfsBlawg](#), May 9, 2010)

V. News Sources

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

Salon, [White House circulating pro-Kagan talking points on diversity](#) (May 6, 2010)