

**SCOTUSblog Briefing Paper****Elena Kagan – Executive Power****June 21, 2010****I. Summary and Our Take**

Elena Kagan’s views on executive power will be a likely focal point at her nomination hearings. In light of her 140-plus-page *Harvard Law Review* article on the topic and her testimony at her Solicitor General confirmation hearings, expect Republicans and Democrats alike to press Kagan on the issue, as each side attempts to glean some indication of Kagan’s views of the constitutionality of the Bush-era concept of executive power.

Kagan’s most extensive discussion of executive power comes in her 2001 *Harvard Law Review* article, [Presidential Administration](#). In it, Kagan argues that the President should play a strong role in managing and controlling the executive branch and its allied independent agencies. For example (as outlined in an earlier [post](#)), the President’s power, in her view, would sensibly include active administrative oversight and direction over the vast collection of federal agencies as they respond to the Gulf oil spill and the economic crisis.

Conservatives view executive control as a constitutional matter and believe that such power increases the prospect that agencies can be blocked from running amok, generally by engaging in excessive regulation. From a policy standpoint, but not as a constitutional matter, Kagan shares some common ground with conservatives who believe in a strong, unitary executive. But for a Democratic President, Kagan argues, such presidential control is vital to the advancement of a progressive agenda. In this respect – using executive power to advance a more liberal President’s own regulatory agenda – Kagan’s position would be quite unlike the conservatives.

In the years since 2001, when Kagan wrote *Presidential Administration*, the concept of executive power, as a constitutional issue, has shifted significantly from domestic to foreign issues, and in particular to Bush-era policies that centered on presidential war-time powers. Though critics may disagree, we do not see anything that one can take away from Kagan’s article which indicates how she comes down on issues of executive power as it pertains to national security and/or the war on terror.

Some on the political left point to one exchange between Lindsay Graham and Kagan at her Solicitor General confirmation hearings as a potential red flag. During the testimony, Senator Graham asked Kagan whether she agreed with Attorney General Holder, when he argued that, under military law, an enemy force can be detained without a trial. Kagan responded, “I think that makes sense, and I think you’re correct that that is the law.” (see hearing [video](#) at 1:37:35). Similarly, Dawn Johnsen, someone widely admired by the left, agreed with Kagan’s answer during her own confirmation hearings for the Office of Legal

Counsel. No one has claimed that Johnsen embraced Bush-style policies regarding a President's war-time powers, nor should they make a similar claim regarding Kagan. A single sentence spoken in a confirmation hearing is simply not enough evidence to understand Kagan's views on such a complicated issue as a President's power during war.

With so little from which to determine her views on major issues, it is unsurprising that much has been made of Kagan's law review article and confirmation-hearing testimony. Insofar as they indicate anything concrete, Kagan clearly argues for the benefits (although not the constitutional mandate) of strong executive power when it comes to controlling and managing government agencies. However, there is nothing in the published record to clearly suggest that Elena Kagan leans one way or the other on the deep and contentious constitutional questions regarding war-time presidential powers.

## II. Relevant Source Materials

### A. [Elena Kagan, \*Presidential Administration\*, \*Harvard Law Review\* \(2001\)](#)

- “The conventional view further posits, although no court has ever decided the matter, that by virtue of this power, Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation — and, indeed, that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official. Clinton's use of what I call directive authority — his commands to executive branch officials to take specified actions within their statutorily delegated discretion — ill-comports with this view. The unitarians would defend the practice simply by insisting, against the weight of precedent, that the Constitution provides the President with plenary authority over administration, so that Congress can no more interfere with the President's directive authority than with his removal power. I too defend the practice, but not on this basis. I accept Congress's broad power to insulate administrative activity from the President, but argue here that Congress has left more power in presidential hands than generally is recognized. More particularly, I argue that a statutory delegation to an executive agency official — although not to an independent agency head — usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion.” (pp.2250-01)
- “Where once presidential supervision had worked to dilute or delay regulatory initiatives, it served in the Clinton years as part of a distinctly activist and pro-regulatory governing agenda. Where once presidential supervision had tended to favor politically conservative positions, it generally operated during the Clinton Presidency as a mechanism to achieve progressive goals. Or expressed in the terms most sympathetic to all these Presidents (and therefore most contestable), if Reagan and Bush

showed that presidential supervision could thwart regulators intent on regulating no matter what the cost, Clinton showed that presidential supervision could jolt into action bureaucrats suffering from bureaucratic inertia in the face of unmet needs and challenges.” (p.2249)

**B. [Letter from Kagan and law deans to the Chairman of the Senate Judiciary Committee \(November 14, 2005\)](#)**

- “We cannot imagine a more inappropriate moment to remove scrutiny of Executive Branch treatment of noncitizen detainees. We are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions, and the abuse of prisoners in Guantanamo, Iraq and Afghanistan. The Graham Amendment will simply reinforce the public perception that Congress approves Executive Branch decisions to act beyond the reach of law. As such, it undermines two core elements of the rule of law: congressionally sanctioned rules that limit and guide the exercise of Executive power and judicial review to ensure that those rules have in fact been honored.”

**C. [Kagan’s Solicitor General confirmation hearings \(video and transcript\)](#)**

- *Responding to a question from Senator Cardin* - Ms. KAGAN: Every Solicitor General nominee who has sat at this table for the past many years has always said that there are two very rare exceptions where a Solicitor General will not defend a statute of the United States. And one exceedingly rare exception is when there is simply no reasonable basis to do so; and second is where that statute infringes directly on the powers of the President...And I would say the same thing to you. I think that there is a category of cases in which statutory defense might be inappropriate because it violates separation of powers concerns. But I think that that is an exceedingly narrow category of cases, and here in thinking about executive power, I would go back to the Youngstown framework that I know so many of you, all of you are familiar with. Of course, that framework says that when Congress authorizes Presidential power, Presidential power is at its highest. When Congress is silent, we are in a kind of middle ground. And where Congress says no to Presidential power, denies Presidential power, Presidential power is at its lowest ebb . . . . There are occasional times where Presidential power still exists even if Congress says otherwise. Think about if Congress were to deny any power of pardons on the President. That would be a time where you would say no, there is a constitutional commitment here. But that category of cases, Senator, I think is exceedingly narrow, and that is how I would approach the problem that you raise.

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- *Interchange with Sen. Graham:* Senator GRAHAM. OK. Let me read from Mr. Holder here. Would you consider him your boss? . . . Now, I asked him this question: “Now, when you talk about the physical battlefield, if our intelligence agencies should capture someone in the Philippines that is suspected of financing al Qaeda worldwide, would you consider that person part of the battlefield, even though we’re in the Philippines, if they were involved in al Qaeda activity?” Holder said, the Attorney General said, “Yes, I would.” Do you agree with that?

Ms. KAGAN. I do.

Senator GRAHAM. So that gets us back to Senator Feinstein’s question. Under the law of armed conflict, as I understand it, and under the Geneva Convention, Article 5 says that if there is a dispute about status, what you are entitled to is an independent, neutral decisionmaker. And in most wars, that can be a battlefield determination by a single officer. But because this is a war without end, that will not end with a ceremony in the USS Missouri, there will be no defined end, I am all for giving more due process. But the point she is making, I think is an important point. You cannot detain someone indefinitely under criminal law. They have to have a trial. But under military law, if you are part of the enemy force, there is no requirement to let them go and go back to the war and kill your own troops. Do you agree that makes sense?

Ms. KAGAN. I think it makes sense, and I think you are correct that that is the law.

Senator GRAHAM. So America needs to get ready for this proposition that some people are going to be detained as enemy combatants, not criminals, and there will be a process to determine whether or not they should be let go based on the view that we are at war, and it would be foolish to release somebody from captivity that is a committed warrior to our Nation’s destruction. Now, the point we have to make with the world, would you agree, Dean Kagan, is that the determination that led to the fact that you are an enemy combatant has to be transparent?

Ms. KAGAN. It does indeed.

Senator GRAHAM. It has to have substantial due process

Ms. KAGAN. It does indeed.

Senator GRAHAM. And it should have an independent judiciary involved in making that decision beyond the executive branch. Do you agree with that?

Ms. KAGAN. Absolutely.

Senator GRAHAM. So we can go tell the world that this person is being held off the battlefield not because one person says so, but because there is a process that led to that determination where you had an independent judiciary involved. Do you think that is important for the Nation to make sure we have that kind of process?

Ms. KAGAN. I do, Senator.

**D. Dawn Johnsen’s “[Questions for the Record](#)” from Senator Sessions.**

- **[Question:]** At her confirmation hearing, Solicitor General nominee Elena Kagan said that under military law there is no requirement to let captured enemies go back to the war. Do you agree?

**Answer:** Yes, I do agree with Dean Kagan’s statement that under traditional military law, enemy combatants may be detained for the duration of the conflict. That is what the Supreme Court said as well in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

**E. Elena Kagan’s “[Questions for the Record](#)” from Senator Leahy. (Submitted February 10, 2009)**

- Solicitor General Hearings Question #6. Do you believe the President has the constitutional authority as commander-in-chief to override laws enacted by Congress and to immunize people under his command from prosecution if they violate these laws passed by Congress?

Do you believe the President has the authority to circumvent the Foreign Intelligence Surveillance Act (FISA), and bypass the FISA court to conduct warrantless electronic surveillance that may include spying on Americans?

**Answer:** The appropriate analysis in considering any question of this kind derives from Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that opinion, Justice Jackson describes three situations: the first where executive power is exercised pursuant to a congressional authorization; the second where executive power is exercised in the absence of any congressional action; and the third “when the President takes measures incompatible with the expressed or implied will of Congress.” In the last situation, Justice Jackson notes, presidential “power is at its lowest ebb” and “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” This does not mean the President *never* has power

to act in such a situation, for on some occasions, as Justice Jackson recognizes, Congress is indeed “disabl[ed]” from acting upon a subject. But these occasions are rare and cannot be created or justified merely by a general invocation of the commander-in-chief power. These principles are the ones I would apply to the consideration of any executive action, including any action relating to FISA.

### III. Those who think Kagan leans conservative on executive power

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

- “Given the severity of the crisis posed by Bush/Cheney lawlessness, what justifies someone with Kagan’s platform -- Dean of Harvard Law School and former Clinton White House lawyer -- remaining utterly silent in the face of that assault? Even if one believes that a Law School Dean should generally be attentive to institution-building, didn’t the severity of the legal crisis spawned by Bush and Cheney merit serious opposition from those in a position to voice it? Before any progressive considers supporting her nomination to the Court, shouldn’t they be able to point to some evidence, somewhere, that she opposed the core claims used to prop up the Bush/Cheney assault on the Constitution and the rule of law?”

“Among the most disturbing aspects is her testimony during her Solicitor General confirmation hearing, where she agreed wholeheartedly with Lindsey Graham about the rightness of the core Bush/Cheney Terrorism template: namely, that the entire world is a ‘battlefield,’ that ‘war’ is the proper legal framework for analyzing all matters relating to Terrorism, and the Government can therefore indefinitely detain anyone captured on that ‘battlefield’ (*i.e.*, anywhere in the world without geographical limits) who is accused (but not proven) to be an ‘enemy combatant.’” ([Salon](#), Apr. 13, 2010)

- “It may be true that strong executive power claims can be used to advance progressive goals **when there is a progressive President**, but such power can and will be used for exactly the opposite purpose **when there is a conservative President** (and indeed, Kagan herself acknowledges that the powers she defends and helped expand were first created by Reagan lawyers who wanted to empower the President to wrest control of administrative agencies from the then-liberal Congress). But that’s always the danger of executive-power enthusiasts like Kagan (and the right-wing ideologues who ruled Washington for the last decade): when their party controls the White House, they are eager to take control away from the much more democratic legislative branch and vest it in the President because of the Good Acts they think will be possible. But they willfully ignore the fact that their party’s control of the White House will inevitably

be temporary, and the Executive-centered system of government they create will then be used for exactly the opposite purposes, with very little democratic checks and restraints.”

“Everyone should decide on their own if [former Acting Solicitor General Walter] Dellinger offered convincing evidence to be confident that Kagan’s approach to these issues will be similar to Justice Stevens’ approach, particularly given the ample evidence to the contrary. If that’s the best case that can be made on behalf of Kagan, that speaks volumes.” ([Salon](#), Apr. 17, 2010)

**B. [Ed Whelan](#), president - Ethics and Public Policy Center.**

- “[O]n issues of executive power and national security, Kagan is far from the Left. For example . . . at her confirmation hearing for Solicitor General, there was ‘no daylight’ between Kagan and Republican senators on ‘the president’s broad authority to detain enemy combatants.’” ([Bench Memos](#), May 10, 2010)
- “Kagan’s leading law-review article, ‘Presidential Administration’ (114 Harv. L. Rev. 2245 (2001)), offers a broad defense of presidential authority and explores ways that courts might promote that authority. So there’s ample reason for folks on the Left on national-security issues to be concerned about her possible nomination.” ([Bench Memos](#), May 18, 2009)

**C. [Paul Campos](#), contributor – The New Republic**

- “Kagan’s 2001 article ‘Presidential Administration,’ published in the *Harvard Law Review*, describes how presidential oversight of federal administrative agency decision-making increased significantly during both the Reagan and Clinton administrations. Yet the article is focused almost solely on outlines of the administrative process, rather than its substance, thus sidestepping almost all potential political controversy. Kagan reaches the unobjectionable conclusion that vigorous presidential oversight is desirable to the extent that it increases the political accountability of administrative agencies and furthers regulatory effectiveness. ([The New Republic](#), May 8, 2010)

**D. [David Fontana](#), professor – George Washington University Law School**

- “If confirmed, Kagan will probably not play a role in scaling back presidential power in any meaningful way. It is certainly true that she probably won’t be as solicitous of presidential power as the Bush administration. In a speech at West Point in 2007, for example, Kagan was critical of the views of executive power expressed by the lawyers in the Bush Justice Department.

The Kagan nomination, combined with the administration’s record on presidential power, could mean that the executive branch is likely to

continue to increase in power – if in far smaller increments than during the Bush administration.

But rather than continuing to hope for a presidential knight in shining armor to restore balance to the separation of powers, perhaps these events will now force us to consider that we should not depend on a president—or the justices a president nominates—to limit the power of the executive branch.” ([Politico](#), May 10, 2010)

#### IV. Those who respond to critiques of Kagan as conservative on executive power issues

##### A. [John Yoo](#) – professor – UC Berkeley School of Law (Boalt Hall)

- “Some have suggested that because her article looks favorably on President Bill Clinton’s energetic use of executive orders and regulatory efforts, Ms. Kagan must agree with the Bush administration’s theories of the unitary executive. This is a mistake that could only be based on reading just the first page of her article. Choosing not to study a treatise on presidential administrative policies containing 527 footnotes is an understandable act of self-preservation. Nonetheless, those who persevere will find that her article clearly and directly rejected the theories supporting the executive branch’s broad constitutional powers. Rather, it is in line with the views of a majority of the Supreme Court justices and many liberal scholars who feel the executive branch’s powers are quite limited.” ([New York Times](#), May 25, 2010)
- See Lawrence Cunningham’s Response ([Concurring Opinions](#), May 27, 2010)

##### B. [Walter Dellinger](#), Partner – O’Melveny & Myers LLP

- “As dean of Harvard Law School, Kagan sharply and publicly criticized the excessive claims of executive authority put forth by Bush administration lawyers such as John Yoo. In an address at her school’s graduation ceremony in 2007, she forthrightly condemned ‘the expedient and unsupported legal opinions’ used by Yoo and other lawyers to justify violations of federal laws regulating wiretapping and interrogation. Kagan minced no words in her critique of Bush administration lawyers who ‘failed to respect the law’ or who manipulated, bent, or evaded the law ‘to seek short-term advantage.’ She also held up as a model to the graduating students and their families and friends the actions of independent counsel Archibald Cox in standing up to President Nixon. And she praised other lawyers such as Jack Goldsmith, who insisted that President Bush cease the secret wiretapping program because they believed it unlawful. . . .



These views do not come as a surprise if one reads Kagan’s 2001 *Harvard Law Review* article ‘[Presidential Administration](#).’ She does not endorse anything remotely like the Bush-Cheney view of broad presidential power to evade laws passed by Congress.” ([Slate](#), Apr. 16, 2010)

C. [Scott Horton](#), contributing editor – *Harper’s Magazine*

- “A number of civil libertarians, including [Paul Campos](#) and [Glenn Greenwald](#), argue that the critical concern of our day is the accumulation of power in the hands of the executive at the expense of civil liberties. In nominating Kagan, they argue, Obama has missed the opportunity to appoint a worthy successor to Stevens to lead the fight against rampaging executive power. I’m sympathetic to this perspective. Kagan’s writings don’t suggest a systematic framework for the analysis of national security questions. . . .

All of this leads to the assumption that as a Supreme Court justice, Elena Kagan will be no enemy to the powers of the executive. As my readers know, I am not sympathetic to this attitude. But I am impressed with Kagan’s powers of analysis and presentation just the same. My suspicion – and it’s only a suspicion – is that Kagan is a liberal in the sense of the Kennedy and Johnson Administrations, someone who has faith in the power of the executive to shape a better and more just state. She pays lip service to the limitations on executive authority contained in the Constitution, but she’s generally in the thrall of executive power.” ([Harper’s Magazine](#), May 11, 2010)

D. [Bradley C.S. Watson](#), adjunct fellow – *Ashbrook Center*

- “Elena Kagan understands progressive aspirations well. In a June 2001 *Harvard Law Review* article entitled “Presidential Administration,” she argued that more direct presidential control over the details of administration could further the ends of the regulatory state. Furthermore, she made the case that courts should be deferential to such presidential administration in light of the fact that, in the Clinton years, ‘presidential supervision’ served as a ‘mechanism to achieve progressive goals,’ including favoring regulation rather than trying to suppress it. She argued that courts should ‘recognize and promote this kind of control over agency policymaking’ through various modifications of existing non-delegation and judicial review doctrines.” ([Bench Memos](#), June 7, 2010)
  - See Adam Shah’s response ([Media Matters](#), June 7, 2010)

V. News Sources

- NPR, [\*Seen As Rising Star, Kagan Has Limited Paper Trail\*](#) (May 9, 2010)
- New York Times, [\*New Justice to Confront Evolution in Powers\*](#) (May 7, 2010)
- New York Times, [\*Kagan's Writings Back Wider Executive Powers\*](#) (May 21, 2010)
- Huffington Post, [\*Elena Kagan and the Limits of Executive Power\*](#) (May 13, 2010)
- The Nation, [\*Will Kagan Take Up Stevens's Fight for Checks on Executive Power?\*](#) (May 10, 2010)
- New York Times, [\*Obama's Choice for Solicitor General Has Left a Breach in a Long Paper Trail\*](#) (Jan. 6, 2009)