

THE ETHICS & RELIGIOUS LIBERTY COMMISSION

OF THE SOUTHERN BAPTIST CONVENTION



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ELENA KAGAN—FACT SHEET

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Supreme Court nominee Elena Kagan deserves strict scrutiny during the nomination process, as she has no judicial experience and has a very thin written record of her constitutional opinions and philosophy. Though she has served as the Solicitor General for the past year and has worked as a faculty member of two distinguished law schools, we are particularly concerned about elements of her record that suggest judicial activism, protections for abortion rights and homosexual rights, and restrictions on the First Amendment. The following Fact Sheet provides some background on Kagan and the central elements of her constitutional philosophy and issue positions.

EDUCATIONAL & ACADEMIC BACKGROUND

- Formerly the Charles Hamilton Houston Professor of Law and Dean of Harvard Law School (2003-2009).¹
- Served as an Assistant Professor and Professor at the University of Chicago Law School (1991-1997).²
- J.D. from Harvard Law School, serving as the supervising editor of the Harvard Law Review (1986).³
- M. Phil. from Worcester College, Oxford, as Princeton's Daniel M. Sachs Graduating Fellow (1983).⁴
- Bachelor's degree from Princeton University (1981).⁵

NOTABLE LEGAL & POLITICAL POSITIONS

- Served as the first female U.S. Solicitor General, representing the United States and the Obama Administration before the Supreme Court (2009-Present).⁶
- Clerked for Justice Thurgood Marshall (1987-1988), who she called "the greatest lawyer of the 20th century."⁷
- Clerked for D.C. Circuit Court of Appeals Judge Abner Mikva (1986-1987).⁸
- Served in the Clinton White House from 1995 to 1999 as Associate Counsel to the President (1995-96), Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council (1997-1999).⁹

¹ <http://www.law.harvard.edu/faculty/directory/index.html?id=112>

² <http://www.law.harvard.edu/faculty/directory/index.html?id=112>

³ http://www.salon.com/news/feature/2010/06/22/us_kagan_murder_boards

⁴ <http://www.foxnews.com/politics/2010/05/09/biographical-information-elena-kagan/>

⁵ <http://www.foxnews.com/politics/2010/05/09/biographical-information-elena-kagan/>

⁶ <http://www.foxnews.com/politics/2010/05/09/biographical-information-elena-kagan/>

⁷ http://www.boston.com/news/nation/washington/articles/2010/04/15/as_potential_pick_for_court_kagan_gets_fire_from_left/

⁸ [kagan_gets_fire_from_left/](http://www.boston.com/news/nation/washington/articles/2010/04/15/as_potential_pick_for_court_kagan_gets_fire_from_left/)

⁸ (p. 2) <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>

⁹ (p. 2) <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>

- Served as a staff member for Dukakis for President Campaign (1988), preparing responses to attacks on Governor Dukakis' record.¹⁰

NOTABLE ASSOCIATIONS AND FINANCIAL CONTRIBUTIONS

- Contributed financially¹¹ to the National Partnership for Women and Families, a pro-choice organization.¹² The NPWF's president, Debra L. Ness, serves on the board of directors for Emily's List and once worked in field operations for the National Abortion Rights Action League.¹³
- Litigation Committee Member -- American Association of University Professors, 2002-2003¹⁴
 - The AAUP has censored Southeastern Baptist Theological Seminary, Cedarville University, Grove City College, Hillsdale College, Brigham Young University, The Catholic University of America, and other schools for "not observing the generally recognized principles of academic freedom and tenure approved by this Association."¹⁵
- Kagan has also been a board member of several organizations including the Equal Justice Project, American Indian Empowerment Fund, and the Thurgood Marshall Scholarship Fund.¹⁶

FAVORITE JURISTS

- Considers Justice Thurgood Marshall, a leader in civil rights law, the "best lawyer of the 20th Century."¹⁷
 - Justice Marshall voted to support abortion rights in *Roe v. Wade*.¹⁸
 - Kagan has a portrait of Justice Marshall in her office. "I chose TM because he was the best lawyer of the 20th century — an absolutely sterling advocate who did more to advance justice in our country (prior to becoming a Justice!) than anyone else I can think of," Kagan said in an e-mail, when we first inquired about her office art. 'On top of all that, I worked for him, and he was a great boss and mentor. It will be wonderful to have him looking down at me as I try to do this job.'¹⁹
- Considers Israeli jurist Aharon Barak her "judicial hero." Barak "is the judge who has best advanced democracy, human rights, the rule of law, and justice."²⁰
 - Barak is widely acclaimed as an activist judge. He has made the following statements:
 - "...some Justices of the United States Supreme Court do not cite foreign case law in their judgments. They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems."²¹
 - "In interpreting such constitutions, preference should be given to the objective purpose that reflects deeply held modern views in the movement of the legal

¹⁰ (p. 2, 69) <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>

¹¹ (p. 5) <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>

¹² http://www.nationalpartnership.org/site/PageServer?pagename=issues_repro

¹³ http://www.nationalpartnership.org/site/News2?page=NewsArticle&id=19691&security=2141&news_iv_ctrl=2061

¹⁴ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12A/upload/12A-DP-9-111080.pdf>

¹⁵ <http://www.aaup.org/AAUP/about/censuredadmins/>

¹⁶ (p. 3) <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>

¹⁷ <http://www.mainjustice.com/2009/10/19/thurgood-marshall-still-watching-over-kagan/>

¹⁸ http://www.oyez.org/cases/1970-1979/1971/1971_70_18/

¹⁹ <http://www.mainjustice.com/2009/10/19/thurgood-marshall-still-watching-over-kagan/>

²⁰ www.hlrecord.org/2.4463/distinguished-israeli-jurist-recvies-2006-justice-prize-1.578536

²¹ Aharon Barak, *The Judge in a Democracy*, 203-204 (Princeton, 2006).

system through history. The constitution thus becomes a living norm and not a fossil, preventing the enslavement of the present to the past.”²²

- “Law is a tool that is intended to realize social goals.”²³
- “Judges should be honest. If they create new law, they should say so. They should not hide behind the rhetoric that judges declare what the law is but do not make it. Judges make law, and the public should know they do.”²⁴
- “On matters of adjudication, the judge is alone. He is subject to no authority other than his understanding of the law.”²⁵

CONSTITUTIONAL OUTLOOK

Kagan has never served as a judge, and has no trail of judicial opinions. However, her interest in being a judge seems to extend to her high school years. In 1977, she was pictured in her high school year book wearing a judges’ robe and holding a gavel. A quote from former Supreme Court Justice Felix Frankfurter was placed next to the photo.²⁶

- There are few writings that provide insight into her judicial philosophy. However, Kagan seems to support a large federal government, though sees limits to strong, centralized executive power.
 - Argued, in *United States v. Comstock*, that the federal government should have the right to civilly commit sex offenders who are approaching the end of their federal sentence. The oral argument declared that this federal authority comes from the necessary and proper clause. (The Office of the Solicitor General also filed a brief with the Court).²⁷
 - Some have argued that upholding this rule within the Adam Walsh Child Protection Act trumps states rights.
 - Was somewhat critical of the “unitary executive” theory – where the President asserts direct authority over the administration – in a 2001 Harvard Law Review article “Presidential Administration.” She declared that it raises “serious constitutional questions.”²⁸
- Appears to have an expansive constitutional philosophy, opening the door for judicial activism.
 - Considers Thurgood Marshall to be one of her heroes.²⁹ While Justice Marshall helped advance civil rights in American constitutional law, he also held an activist judicial philosophy. It is likely that Kagan has a similar view.
 - Remarkd in a 1995 book review article in the University of Chicago Law Review that the decisions of Supreme Court justices have “little to do with technical legal ability and much to do with conceptions of value.”³⁰

SPECIFIC ISSUES

Again, while Kagan has written very few articles on specific constitutional issues, some of her writings reveal insights about her positions.

➤ LIFE ISSUES

²² *Id.* at 13.

²³ *Id.* at 117.

²⁴ *Id.* at 112.

²⁵ *Id.* at 80.

²⁶ <http://www.cnn.com/2010/POLITICS/05/10/elena.kagan.early.years/>

²⁷ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan15E/upload/15E-MPB19-UnitedStatesV-Comstock-08-1224.pdf>

²⁸ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12A/upload/12A-FP10-2001PresidentialAdministration.pdf>

²⁹ <http://www.mainjustice.com/2009/10/19/thurgood-marshall-still-watching-over-kagan/>

³⁰ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12A/upload/12A-FP15-1995ConfirmationMesses-OldAndNew.pdf>

ABORTION

During her legal career, Kagan has not written much about abortion. However, evidence from her years as domestic policy staffer in the Clinton White House provide some evidence that she may support abortion with limits.

- Wrote a memo to President Clinton in 1997, urging him to support a Senate bill that banned late term abortions as a political compromise, even though she suggested that it might be unconstitutional.³¹
 - However, this bill was largely derided by Senate Republicans for its loopholes.³²
- Criticized *Rust v. Sullivan*, a 1991 Supreme Court decision which upheld federal regulations barring federally funded health clinics from promoting, encouraging, or advocating abortion.³³
- Wrote, apparently in frustration, about the “victories of these anonymous but Moral Majority-backed [candidates] . . . these avengers of “innocent life” and the B-1 Bomber” in the 1980 elections.³⁴
 - Groups such as the National Right to Life are troubled by her dismissive attitude toward unborn life, especially her decision to put the term “innocent life” in quotation marks.³⁵
- President Obama has consistently said that he will nominate justices “who [pay] heed to the rights of women and the privacy of their bodies,” which is common rhetoric in the pro-choice community.³⁶ Therefore, it is unlikely that Kagan disagrees with his view on abortion.

CLONING

- While serving on the Domestic Policy Council during the Clinton Administration, Kagan wrote two memos to the President advocating the findings of the National Bioethics Advisory Commission report on cloning. The NBAC determined it was ethical to clone embryos solely for research purposes.³⁷

➤ HOMOSEXUALITY

Several of Kagan’s writings and actions provide evidence that she is in favor of expanded rights for homosexuals, though her view on same-sex marriage is unclear.

- Declared that she “abhorred the military’s discriminatory recruitment policy” [“Don’t Ask, Don’t Tell”], calling it “a profound wrong -- a moral injustice of the first order.”³⁸ Kagan limited military recruiters’ access to the students of Harvard Law School.³⁹
 - Joined a Supreme Court amicus brief asking the Court to overturn the Solomon Amendment (*Rumsfeld v. F.A.I.R.*), which required schools that receive federal funding to allow military recruiters on campus. Harvard and other law schools were denying military

³¹ (p. 6-7) http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%201-4/152_DOMESTIC%20POLICY%20COUNCIL%20BOXES%201-4.pdf

³² <http://www.newsweek.com/2010/05/13/context-matters.html?from=rss>

³³ <http://www.humanevents.com/article.php?id=37071>

³⁴ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12A/upload/12A-DP-9-111080.pdf>

³⁵ http://www.nrlc.org/press_releases_new/Release051010.html

³⁶ <http://abcnews.go.com/Politics/wirestory?id=10431821&page=2>

³⁷ <http://www.aul.org/2010/06/auls-kagan-file-the-human-cloning-memo/>

³⁸ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12H/upload/12H-40-100603.pdf>

³⁹ <http://online.wsj.com/article/SB10001424052702304846504575178390602940072.html>

recruiters access to their students. In an 8-0 ruling, the Supreme Court upheld the Solomon Amendment.⁴⁰

- Many conservatives have also been critical of the Justice Department's tepid defense of the Defense of Marriage Act (DOMA) which defines marriage as between a man and a woman and allows the states to not recognize gay marriage. As Solicitor General, Kagan has assisted in crafting this weak defense.⁴¹
- Wrote a memo to Justice Thurgood Marshall urging the court to hear a case of a life-term prisoner in New York that wanted the state to recognize his gay marriage. The marriage license was in Kansas, and he expected New York to recognize it under the full faith and credit clause. However, gay marriage is illegal in the state of New York. Kagan was quoted as saying the prisoner's case is "at least arguably correct."⁴²
- President Obama has stated his commitment to the gay, lesbian, bisexual, and transgender agenda,⁴³ so it is very likely that Kagan, as his nominee, will seek to expand rights in these areas.
- Dr. Richard Land, the Ethics & Religious Liberty Commission's president, has raised concerns about Kagan's support of the radical homosexual agenda and its impact on First Amendment religious liberty rights. In a commentary on Kagan's upcoming Supreme Court confirmation hearings, he says, "Ms. Kagan should be asked whether she agrees with Georgetown law professor Chai Feldblum's assertion that when the relative rights of Lesbian, Gay, Bisexual, Transgendered (LGBT) people and other people's religious beliefs conflict and collide legally, 'society should come down on the side of protecting the liberty of LGBT people.'" President Obama signaled agreement with this erroneous view when he recess-appointed Chai Feldblum as a Commissioner of the Equal Employment Opportunity Commission. Kagan's obvious sympathy with the radical homosexual agenda raises serious concerns about whether or not she shares this unconstitutional opinion and would rule against First Amendment religious liberty protections in favor of the radical homosexual agenda as a Supreme Court justice. (See Dr. Land's attached commentary.)

➤ **FIRST AMENDMENT**

Multiple writings show that Kagan believes in several important restrictions of First Amendment rights, including political speech of interest groups and hate speech.

- Brought *Citizen's United v. Federal Elections Commission* to the Supreme Court as her first case before the Court, supporting the government's right to limit interest group involvement in campaign finance. This campaign finance policy has been widely criticized by conservatives for restricting free speech.⁴⁴
- According to CNSNews, Kagan argued in a 1996 *University of Chicago Law Review* article "Private Speech Public Purpose" that "the government's reasons for restricting free speech were what mattered most and not necessarily the effect of those restrictions on speech."⁴⁵
 - The implications of her arguments are that justices should seek to determine if the "motive" is unconstitutional, not the law. This would likely lead to the invalidation of laws pertaining to the First Amendment that would, on their face, pass constitutional scrutiny. This also seems to be a theoretical justification for judicial activism.

⁴⁰ <http://judiciary.senate.gov/nominations/SupremeCourt/upload/15F-AmicusBrief-ForumForAcademicAndInstitutionalRights.pdf>

⁴¹ <http://www.bpnews.net/BPnews.asp?ID=32903>

⁴² http://www.cbsnews.com/8301-504564_162-20006769-504564.html

⁴³ <http://www.whitehouse.gov/issues/civil-rights>

⁴⁴ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan15E/upload/15E-MPB13-AstrueV-Ratliff-8-1322.pdf>

⁴⁵ <http://www.cnsnews.com/news/article/65720>

- Argued, in a 1993 *University of Chicago Law Review* article “Regulation of Hate Speech and Pornography after R.A.V.,” that there are areas, not protected by the First Amendment, where both hate speech and pornography can be regulated.⁴⁶
 - Declares in a 1992 *The Supreme Court Review* article that legislation outlawing certain specific types of hate speech, not merely generally applicable “fighting words,” may not violate the First Amendment (as was ruled in *R.A.V. v. St. Paul*).⁴⁷ This may signal her proclivity to upholding hate speech laws, allowing restrictions on speech that many justices would strike down based on First Amendment rights.

While Solicitor General, Kagan’s office supported the free exercise of religion, in opposition to the strict separation of church and state.

- The Office of the Solicitor General wrote a Reply Brief supporting the petitioners (Ken Salazar and the Department of Interior) in *Salazar v. Buono* – the establishment clause case about the large cross on federal lands in California.⁴⁸

➤ **SECOND AMENDMENT**

While Kagan has not written much on the Second Amendment, evidence suggests she is hostile to gun rights.

- “Gun rights advocates already have locked in on a 1997 Kagan memo that paved the way for an executive order banning dozens of semiautomatic weapons as an example of the nominee’s anti-gun views. They also point to Kagan’s background working for judges, such as federal Judge Abner Mikva, who later brought Kagan into the White House to serve as his deputy and who once likened the NRA to a ‘street-crime lobby.’ But Kagan more recently has pledged her fidelity to the Supreme Court’s 2008 decision in the case, *District of Columbia vs. Heller*, that found a constitutional right to own a handgun for personal protection. The White House maintains that Kagan would view her role as a justice differently from that of a policy-crafter in the Clinton White House.”⁴⁹
- As a U.S. Supreme Court law clerk in 1987, Kagan stated that she was “not sympathetic” to a man who claimed that D.C.’s firearms statutes violate his Second Amendment rights.⁵⁰⁵¹

➤ **WAR ON TERROR**

Kagan has a mixed record on national defense efforts related to the War on Terror.

- As Solicitor General, her office submitted a brief in favor of upholding a law forbidding material support and resources to terrorist groups (*Holder v. Humanitarian Law Project*).⁵²
 - “During her confirmation hearing last week, [Elena Kagan](#), the nominee for solicitor general, said that someone suspected of helping finance Al Qaeda should be subject to

⁴⁶ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12A/upload/12A-FP16-1995RegulationOfHateSpeechAndPornography.pdf>

⁴⁷ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan12A/upload/12A-FP20-1992TheChangingFacesOfFirstAmendmentNeutrality.pdf>

⁴⁸ <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan15E/upload/15E-MPB26-SalazarV-Buono-08-0472.pdf>

⁴⁹ <http://articles.latimes.com/2010/may/27/nation/la-na-kagan-guns-20100528>

⁵⁰ <http://www.bloomberg.com/news/2010-05-12/kagan-said-she-was-not-sympathetic-toward-gun-rights-claim-in-1987-memo.html>

⁵¹ http://www.cbsnews.com/htdocs/pdf/Kagan_guns.pdf

⁵² <http://judiciary.senate.gov/nominations/SupremeCourt/Kagan15E/upload/15E-MPB10-HolderV-HumanitarianLawProject-08-1498.pdf>

battlefield law — indefinite detention without a trial — even if he were captured in a place like the Philippines rather than in a physical battle zone.”⁵³

- Signed a letter with three other law school deans to Senator Patrick Leahy (November 14, 2005) opposing the Graham Amendment to the Department of Defense authorization bill insofar as it would have stripped the federal courts of jurisdiction to hear habeas petitions brought by detainees at Guantanamo Bay.⁵⁴

SBC’s Richard Land calls senators to challenge Kagan’s position on First Amendment

May 10, 2010

NASHVILLE, Tenn.—Dr. Richard Land, president of the Southern Baptist Convention’s Ethics & Religious Liberty Commission comments on President Barack Obama’s appointment of Elena Kagan to the Supreme Court.

“First of all, let me say that as a Princeton graduate (class of ’69) I applaud the recent bipartisan trend of nominating Princeton graduates to the nation’s highest court. Elena Kagan (class of ’81) makes three Supreme Court nominees in a row, following President Bush’s nomination of Justice Samuel Alito (class of ’72) and President Obama’s nomination of Justice Sotomayor (class of ’76). Add those nominations to Michelle Obama (class of ’85) being Princeton’s first First Lady and you have quite a streak for Old Nassau.

“Ms. Kagan’s nomination, however, will be considered controversial for several reasons. First, her lack of judicial experience will be an issue. She is the first Supreme Court nominee in 38 years without previous judicial experience.

“However, social conservatives should focus on her role as dean of Harvard Law School in barring ROTC from campus during the Iraq war because of the military’s ‘don’t ask, don’t tell’ policy, which she described as “a moral injustice of the first order.” She wrote an email message to students and faculty declaring, ‘I abhor the military’s discriminatory recruitment policy.’

“In 2004 she signed an amicus brief when a coalition of law schools challenged the Solomon Amendment which denied federal funds to schools that barred military recruiters. She then joined Harvard University and 39 fellow law school professors in calling for the Supreme Court to reject the Solomon Amendment. She and her fellow professors were rebuffed by an 8-0 Supreme Court decision in late 2006.

“Given this strong hint of activism on behalf of gay rights and the fact that she has been recommended by a President committed to the gay, lesbian, bisexual, transgendered agenda, she should be questioned extensively on the issue.

⁵³ http://www.nytimes.com/2009/02/18/us/politics/18policy.html?pagewanted=1&_r=1

⁵⁴ <http://judiciary.senate.gov/nominations/SupremeCourt/upload/12C-4-111405OppositionToGrahamAmendment.pdf>

“Just how radical is she on these issues? Ms. Kagan should be asked whether she agrees with Georgetown law professor Chai Feldblum’s assertion that when the relative rights of Lesbian, Gay, Bisexual, Transgendered (LGBT) people and other people’s religious beliefs conflict and collide legally, ‘society should come down on the side of protecting the liberty of LGBT people.’

“Professor Feldblum, given a recess appointment by President Obama to the Equal Employment Opportunity Commission (EEOC) on April 7, 2010, went on to state that ‘Protecting one group’s identity liberty, may, at times, require that we burden others’ belief liberty.’ Does Ms. Kagan agree with Feldblum’s views, as stated in ‘Moral Conflict and Liberty: Gay Rights and Religion’ (Georgetown Law Faculty Publications, January 2010, originally published in Brooklyn Law Review, 2006), where she also declares that the law should ‘not privilege moral beliefs that are religiously based over other sincerely held core, moral beliefs.’

“Anybody remember the First Amendment?

“Every U.S. Senator given the opportunity should ask Solicitor General Kagan that question, and until they receive an answer that repudiates Professor Feldblum’s First Amendment-denying legal philosophy, they should refuse to confirm her to the highest court in the land.”

The Southern Baptist Convention is America’s largest non-Catholic denomination with more than 16.2 million members in over 44,000 churches nationwide. The Ethics & Religious Liberty Commission is the SBC’s ethics, religious liberty and public policy agency with offices in Nashville, Tenn., and Washington, D.C.