

# Obama picks Solicitor General Elena Kagan for Supreme Court

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President Barack Obama announced Monday morning that he would nominate Solicitor General Elena Kagan, the administration's top lawyer, to fill the vacancy on the US Supreme Court created by the retirement of Justice John Paul Stevens, leader of the four-member liberal minority on the court.

Kagan is expected to be confirmed without great difficulty later this summer, with Republicans already agreeing that a vote should be held before the August congressional recess so the new justice can be seated before the new Supreme Court term begins in October.

Seven Republicans voted to confirm Kagan's nomination as Solicitor General a year ago, making it unlikely that her opponents could achieve the unanimous Republican support required for a filibuster to block the nomination.

Senator Lindsey Graham of South Carolina, a leading Republican on the Senate Judiciary Committee, said in a statement: "Solicitor General Kagan has a strong academic background in the law. I have been generally pleased with her job performance as Solicitor General, particularly regarding legal issues related to the War on Terror."

In the run-up to the nomination, the White House maneuvered politically in the style which has become the norm for this administration. Three candidates were designated as the semi-official frontrunners: Appeals Court Judge Merrick Garland, the most conservative; Appeals Court Judge Diane Wood, the most liberal; and Kagan, presented as the moderate in-between, whose selection would convey Obama's desire for bipartisan consensus and conciliation with the Republican minority in the Senate.

As the *New York Times* observed, "in his selection of finalists, Mr. Obama effectively framed the choice so that he could seemingly take the middle road by

picking Ms. Kagan, who correctly or not was viewed as ideologically between Judge Wood on the left and Judge Garland in the center."

Kagan has never been a judge and has written little on controversial legal and social issues, making her political views relatively opaque. In her 15 months as Solicitor General, the most notable cases taken up by her office have been in defense of the prerogatives of the executive branch in intelligence, surveillance and prisoner detention. In that sphere, at least, her selection to replace Justice Stevens means a shift to the right.

The widespread media speculation about whether Kagan is more or less liberal than Stevens in her personal views largely misses the point, however, since American liberalism has itself undergone a protracted rightward drift over the past four decades.

Stevens, a Republican nominated by a Republican president, Gerald Ford, is the product of an earlier generation, a period when liberalism was a significant political current even in the Republican Party, and was associated with mass struggles from below against social and economic inequality, by the labor and civil rights movements.

Stevens, now 90, came of age in the Great Depression, and was a 17-year-old in Chicago when police shot down striking steelworkers in the 1937 Memorial Day Massacre. He was a moderately liberal Republican appeals court judge when named to the Supreme Court in 1975 by President Ford. He only emerged as a leader of the liberal wing as more liberal justices retired and the court moved further and further to the right in the 1980s and 1990s.

Kagan was raised in a liberal Democratic family in Manhattan. Her father was a housing and tenants' rights lawyer, her mother a public schoolteacher, as are her two brothers. She was steeped in the social-

democratic politics of the New York Jewish trade union milieu, not only through her family connections, but as a student, writing a 153-page senior thesis at Princeton on the politics of the Socialist Party in New York City, 1900-1933. She later won a fellowship to study at Oxford, where her chosen field of study was “the history of British and European trade unionism.”

Her thesis advisor, history professor Sean Wilentz, interviewed by the *Daily Princetonian* after Kagan’s nomination was announced, defended his former student against suggestions that the topic of her thesis revealed well-hidden left-wing views. “Elena Kagan is about the furthest thing from a socialist. Period. And always had been. Period,” Wilentz declared.

While she served as a law clerk for two prominent liberals, appeals court judge Abner Mikva and Supreme Court Justice Thurgood Marshall, Kagan’s liberalism is rooted in identity politics, primarily feminism and gay rights, and has no connection with the mass struggles of earlier years. She shares that political background with Obama himself, who is two years younger, and worked side by side with her in the early 1990s at the University of Chicago Law School.

Kagan served on the legal staff of the Clinton White House, rising to the position of deputy to the top adviser on domestic policy, Bruce Reed, a representative of the right-wing Democratic Leadership Council. Reed and Kagan worked closely together in drafting the Clinton administration’s welfare reform policy, which led to the abolition of Aid to Families with Dependent Children in 1996.

Clinton nominated Kagan to a position on the US Court of Appeals for the District of Columbia, the leading appeals court and a frequent staging ground for future Supreme Court nominees. The Senate, then under Republican control and in the wake of the Clinton impeachment trial, refused to vote on Kagan’s nomination, which lapsed when the administration left office. She took a position at Harvard Law School, rising quickly to the position of dean. Her best-known action at Harvard was to recruit several prominent conservatives as law professors.

During this period, her strongest public pronouncement came in a legal brief signed by numerous law professors supporting a ban on military recruiters at major law schools. The ban was imposed because the Pentagon’s “don’t ask, don’t tell” policy

on gays violated the non-discrimination policies of the schools.

Kagan described the inability of gays to serve openly in the military as a “monstrous injustice,” a term which apparently does not apply to such barbarities as the indefinite detention of prisoners without trial or judicial proceeding of any kind, in US facilities like Guantánamo Bay, assassinations ordered by the US president, or the systematic illegal wiretapping of US citizens.

In her confirmation hearing as Solicitor General, Kagan embraced the Bush administration perspective of a global war on terror, in which the entire planet should be considered, from a legal standpoint, part of the battlefield in which the rules of war and military justice could be applied. She later defended the “state secrets privilege,” a legal doctrine that effectively bars suits against illegal government surveillance, and opposed granting habeas corpus rights to prisoners at US facilities in Afghanistan.

On economic policy, like the liberals she will join on the court, Ruth Bader Ginsburg, Stephen Breyer and Sonya Sotomayor, Kagan has a distinctly pro-corporate and pro-business record, having served as a paid member of an advisory panel for Goldman Sachs from 2005 to 2008.



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