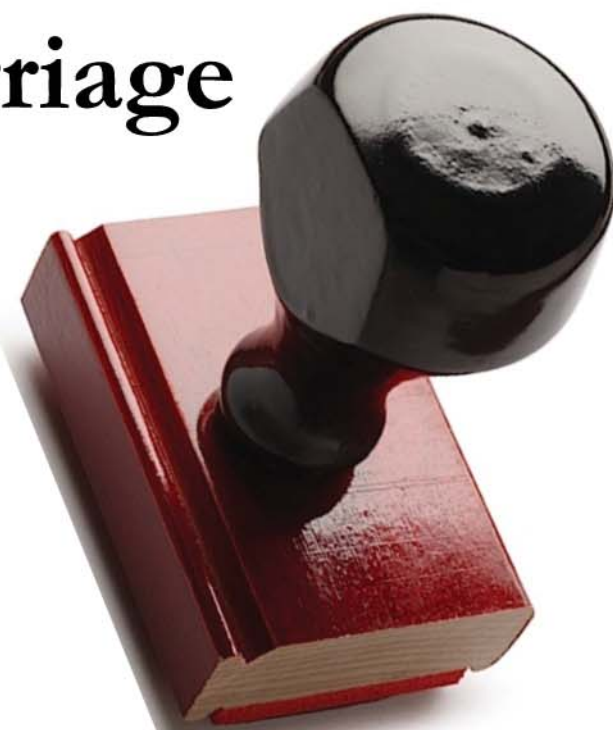


To: Justice Elena Kagan
From: President Barack Obama
RE: Big Government Agenda

Obama Agenda

- ObamaCare
- Cap & Tax
- Bailouts
- Gun Control
- Abortion on Demand
- Free Speech Limits
- Same-Sex Marriage



THE JUDICIAL CRISIS NETWORK

- The Judicial Crisis Network is dedicated to strengthening liberty and justice in America.
- Our commitment is to the Constitution and the Founders' vision of a nation of limited government; dedicated to the rule of law; with a fair and impartial judiciary. Every American deserves equal justice under law.
- Our operational mission is to promote this vision at every level and branch of government—and to educate and organize citizens to participate in this mission.
- We support efforts to ensure only highly qualified individuals who share this vision comprise our state and federal courts and staff executive branch offices that administer and enforce the law.
- We support legislative and legal efforts which oppose attempts to undermine the rule of law; unconstitutionally expand the power of government; politicize the enforcement of the law; threaten American sovereignty; supplant American law with foreign or international law; or bias the legal system on behalf of politically favored groups or individuals.

Introduction

Solicitor General Elena Kagan is far outside the mainstream of American legal thought, out of step with Main Street Americans, and lacks any substantial qualifications to sit on the Supreme Court.

The “empathy” standard. President Obama promised in a speech to Planned Parenthood to nominate a liberal judicial activist who will decide cases based on emotions and personal politics. According to President Obama, “truly difficult” cases require resort to “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.” In short, “the critical ingredient is supplied by what is in the judge’s heart,” not by the law or the Constitution.

The Constitution as inconvenience. President Obama embraces the lawless empathy standard because he views the Constitution as an inconvenient limitation on his ability to tax, regulate, or otherwise control virtually every aspect of American life. We therefore should not be surprised that he would nominate someone who would ignore the Constitution in order to rubber-stamp ObamaCare, gun control laws, more bailouts and buyouts, and support the other litmus test issues of the liberal agenda, including racial preferences, same-sex marriage, and abortion on demand.

Inexperience. President Obama found his rubber stamp in Elena Kagan, a nominee who has never been a judge on any court, federal or state, trial or appellate. Kagan’s lack of relevant experience is so glaring that it has prompted comparisons to Harriet Miers, the Bush nominee who was attacked by Republicans for her inexperience and inscrutability and by Democrats for being too close to the President.

According to the chart below, compiled using data available from the Federal Judicial Center, that comparison might not be far off the mark. Neither Miers nor Kagan was a judge before being nominated. While Miers and Kagan had spent nearly the same amount of time in government at the time of their nominations, Miers had been a practicing lawyer for more than a quarter-century longer than Kagan. The only significant experience advantage Kagan has over Miers is in academia. Even here, though, her prominence stems from her work as a bureaucrat, not for brilliant scholarship or advocacy. Her publication record is thinner than any other tenured Harvard Law professor—and many of the untenured professors as well.

“President Obama found his rubber stamp in Elena Kagan, a nominee who has never been a judge on any court, federal or state, trial or appellate. Kagan’s lack of relevant experience is so glaring that it has prompted comparisons to Harriet Miers, the Bush nominee who was attacked by Republicans for her inexperience and inscrutability and by Democrats for being too close to the President.”

LEVELS OF EXPERIENCE FOR SUPREME COURT NOMINEES

| Years: | Academia | Private Practice | Government | Judge |
|---------------------|-----------|------------------|------------|----------|
| Sonia Sotomayor | 0 | 8 | 5 | 17 |
| Samuel Alito | 0 | 0 | 14 | 16 |
| John Roberts | 0 | 12 | 11 | 2 |
| Stephen Breyer | 13 | 0 | 6 | 13 |
| Ruth Bader Ginsburg | 19 | 0 | 2 | 13 |
| Clarence Thomas | 0 | 2 | 14 | 1 |
| David Souter | 0 | 2 | 10 | 12 |
| Anthony Kennedy | 22 | 14 | 0 | 13 |
| Antonin Scalia | 12 | 7 | 6 | 4 |
| Sandra Day O'Connor | 0 | 8 | 14 | 6 |
| William Rehnquist | 0 | 15 | 3 | 0 |
| John Paul Stevens | 0 | 22 | 2 | 5 |
| Averages: | 5.5 | 7.5 | 7.25 | 8.5 |
| Harriet Miers | 0 | 28 | 6 | 0 |
| Elena Kagan | 14 | 2 | 7 | 0 |

Judicial biographies obtained from the Federal Judicial Center, www.fjc.gov.

“It is difficult to see how Kagan’s political experiences and lack of judicial experience qualify her for a seat on the Supreme Court. Moreover, her record calls into doubt her ability to carry out her judicial role with fairness and impartiality, and to serve as a constitutional check at a time when the government is constantly expanding its reach into the lives and pocketbooks of ordinary Americans.”

A political lawyer. What legal experience Kagan does have is as a political lawyer, working for the Clinton Administration on controversial issues including the Paula Jones scandal, Whitewater, partial birth abortion, and Second Amendment rights, or for the Obama Administration, for which she has argued only a handful of cases.

It is difficult to see how Kagan’s political experiences and lack of judicial experience qualify her for a seat on the Supreme Court. Moreover, her record, what little of it exists, calls into doubt her ability to carry out her judicial role with fairness and impartiality, and to serve as a constitutional check at a time when the government is constantly expanding its reach into the lives and pocketbooks of ordinary Americans.

Out of touch. Elena Kagan has lived virtually her entire life in three places: Manhattan, Cambridge, and Washington. She has worked in the private sector

for two years. Her resume reads like a top-hits list of American liberalism: aide for Dukakis for President; law clerk for Thurgood Marshall; law professor at Harvard; policy adviser for President Clinton; personal friend of President Obama. According to the Boston Herald, she has been a “faithful Democratic donor over the past decade, lavishing nearly \$15,000 on candidates from Barack Obama to Al Gore. . . .”¹ Other recipients of Kagan’s largesse include John Kerry and failed Massachusetts governor Deval Patrick. In short, Elena Kagan is the perfect profile of an East Coast liberal elite. The White House’s suggestion that she understands “the lives of ordinary Americans” is simply laughable. As Slate’s John Dickerson has written, “It’s just not immediately obvious how a graduate of Princeton who taught law at the University of Chicago and Harvard and then became dean of Harvard Law School has the common touch.”²

1 Richard Weir, *Elena Kagan a Big Dem Donor*, BOSTON HERALD, May 13, 2010, http://www.bostonherald.com/news/us_politics/view/20100513elena_kagan_a_big_dem_donor_contributions_likely_to_raise_eyebrows/.

2 John Dickerson, *Empathy in Academia*, SLATE, May 10, 2010, <http://www.slate.com/id/2253505>.

“The White House’s suggestion that [Kagan] understands ‘the lives of ordinary Americans’ is simply laughable. As Slate’s John Dickerson has written, ‘It’s just not immediately obvious how a graduate of Princeton who taught law at the University of Chicago and Harvard and then became dean of Harvard Law School has the common touch.’”

Consistent Record of Anti-Life Advocacy

Elena Kagan has a long record on life-related issues, stemming mostly from her work as an adviser to President Clinton. It is clear from that record that Kagan is committed to the erroneous jurisprudence of *Roe v. Wade* and the cases that followed. Additionally, on the issues of partial birth abortion and assisted suicide, she has taken positions that place her on the far left of the debate over life issues.

- **Partial Birth Abortion:** As a member of President Clinton’s Domestic Policy Council (DPC), Kagan wrote a memo supporting the Daschle “health exception” to the partial birth abortion ban. She argued that the Republican bill would be struck down by the courts on constitutional grounds because “pre-viability restrictions significantly intrude on the essential holding of the *Roe v. Wade* decision.”³ Of course the breadth of the term “health” as legally interpreted is sufficient to make any ban on partial birth abortion practically meaningless, and in 2007 the Supreme Court found that even a ban of the procedure without a health exception was constitutional.
- **Partial Birth Abortion:** Kagan also helped prepare the statement eventually released by the American College of Obstetricians and Gynecologists, setting forth its opposition to a partial birth abortion ban.⁴
- **Federal Funding for Abortion:** Kagan helped President Clinton articulate his position against the Hyde Amendment and in favor of federal funding of abortion.⁵ She corresponded with the Legal Director of NARAL regarding its attempt to slow the progress toward passage of the Child Custody Protection Act, which would have made it a federal offense to transport a minor across a state line for an abortion to avoid parental consent laws.⁶
- **Stem Cells and Cloning:** Kagan was a key player in the Clinton administration, shaping and executing the President’s response to the development of new bio-technology. In a news update for the President, Kagan highlighted an item in *Science* supporting NIH’s funding of stem cell research. Kagan wrote that the article, “which makes clear the scientific and medical potential of stem cell research, should help us to defeat legislation proposed by pro-life members of congress to prohibit NIH from funding such experiments.”⁷

“As a member of President Clinton’s Domestic Policy Council (DPC), Kagan wrote a memo supporting the Daschle ‘health exception’ to the partial birth abortion ban. She argued that the Republican bill would be struck down by the courts on constitutional grounds because ‘pre-viability restrictions significantly intrude on the essential holding of the *Roe v. Wade* decision.’”

- **Stem Cells and Cloning:** As a lead Domestic Policy Council staffer on cloning issues, Kagan recommended that the President propose legislation banning cloning for reproductive purposes, but allowing it for research purposes: “The right-to-life community already has criticized NBAC for not recommending a ban on create cloned embryos. But there are good reasons for not going so far. **There is no moral rationale for treating embryos created through cloning different than embryos created through other means**”⁸
- **Euthanasia:** In handwritten notes on a Department of Justice memorandum regarding the Oregon Death with Dignity Act, Kagan wrote, “We need to decide whether to accompany this ruling with new legislation making assisted suicide a federal crime. This is a fairly terrible idea.”⁹
- **Assessment by Pro-Life Organizations:** The nation’s leading pro-life organization, the National Right to Life Committee, has reviewed this record and concluded, “Elena Kagan is first and foremost a social engineer, animated primarily by a desire to shape public policy on a host of issues. . . . [W]e anticipate that Ms. Kagan often will treat the U.S. Constitution not as a body of basic law that truly constrains both legislators and judges, but rather, as a cookbook in which may be found legal recipes that will allow the imposition of the policies that Ms. Kagan deems to be justified or advisable” For instance, Kagan set aside “constitutional technicalities” in the partial-birth abortion fight to find “a workable strategy to defeat the bill and keep partial-birth abortion unrestricted. . . . Ms. Kagan played a key role in keeping the brutal partial-birth abortion method legal for an additional decade.”¹⁰ Americans United for Life, which focuses specifically on the legal aspects of life issues, says that “Her respect for the judicial activist philosophy is exactly the thinking that led the Supreme Court to appoint itself the sole arbiter of abortion policy, denying the American people the right to be heard on this critical issue.”¹¹

“As the lead Domestic Policy Council staffer on cloning issues, Kagan recommended that the President propose legislation banning cloning for reproductive purposes, but allowing it for research purposes.”

3 Hilley/Kagan/Thornton memo to the President, April 10, 1997, Subject: “Partial-Birth” Abortion.

4 Kagan notes found in Clinton Library Archives, DPC Box 69, Folder 001.

5 Kagan notes on Gotbaum memo to Klein/Kagan/Chow, July 30, 1997, Subject: Revised Hyde Amendment Language for Labor HHS SAP.

- 6 Betsy Cavendish memo to Kagan, May 13, 1998, regarding the Child Custody Protection Act.
- 7 Reed/Kagan memo to the President, Mar. 20, 1999, Subject: DPC Weekly Report.
- 8 Gibbons/Kagan memo to the President, June 8, 1997, Subject: Cloning Policy Decisions.
- 9 Kagan notes on DOJ/OLC memo, Jan. 16, 1998, Subject: Physician-Assisted Suicide.
- 10 O’Steen/Johnson/Muskett letter to the U.S. Senate, June 23, 2010, <http://nrlc.org/Judicial/NRLCletterToSenateOnKaganJune232010.pdf>.
- 11 Legal Analysis of Kagan Appointment, May 10, 2010, <http://www.aul.org/legal-analysis-of-kagan-appointment>.

National Right to Life Committee: “Elena Kagan is first and foremost a social engineer, animated primarily by a desire to shape public policy on a host of issues. . . . [W]e anticipate that Ms. Kagan often will treat the U.S. Constitution not as a body of basic law that truly constrains both legislators and judges, but rather, as a cookbook in which may be found legal recipes that will allow the imposition of the policies that Ms. Kagan deems to be justified or advisable . . .”

An Extreme Record on the Second Amendment

Elena Kagan served as a high-ranking adviser to President Clinton during one of the most anti-Second Amendment Administrations in history. In that capacity, Kagan did not simply go along with the Administration's extreme positions—she was frequently an outspoken advocate of firearm restrictions and a harsh critic of organizations like the National Rifle Association.

- **Claim Against D.C. Gun Ban:** As a clerk for Justice Marshall, Kagan wrote a memo evaluating a citizen's claim that the District of Columbia's gun and ammunition regulations violated his constitutional right to own a firearm. Kagan's blunt assessment of the claim: "I'm not sympathetic."¹²
- **"Aggressive" Approach in Anti-Gun Proposals:** In a news update for President Clinton, she celebrated a *New York Times* story on a meeting between the President and House Democrats regarding the Administration's pending gun control legislation. She sought to capitalize on the momentum from the meeting and front-page story, writing, "We will give you a separate memo early this week outlining **an aggressive strategy for administration officials and Democratic Members of Congress to press for quick passage of our gun control proposals.**"¹³
- **Restricting Importation of Firearms:** Kagan played a key role drafting President Clinton's **directive banning the importation of 58 types of firearms** and related accessories.¹⁴ According to White House records, Kagan's colleague José Cerda stated, "We are taking the law and bending it as far as we can to capture a whole new class of guns."¹⁵
- **Hostility to Gun Rights:** That same directive contained several statements that can only be interpreted to mean that Kagan is hostile to the rights of Americans who own guns for hunting and self-protection. For instance, according to the text Kagan drafted, "The number of weapons at issue underscores the potential threat to the public health and safety that necessitates immediate action."¹⁶
- **Antagonizing the NRA:** While Associate White House Counsel, Kagan wrote a memo regarding the threat posed by "right-wing extremists." She specifically discussed the NRA's past efforts to transfer law enforcement responsibility from the Bureau of Alcohol, Tobacco and Firearms to another federal agency. She crassly suggested following a politically expedient course rather than the best policy simply to antagonize the

"[Kagan] crassly suggested following a politically expedient course rather than the best policy simply to antagonize the NRA: 'Support of the ATF, as against proposals to transfer its functions to another agency, will not necessarily best serve the interest of gun law enforcement. It is, however, an attractive political position, given that the NRA is the ATF's principal enemy.'"

NRA: “Support of the ATF, as against proposals to transfer its functions to another agency, will not necessarily best serve the interest of gun law enforcement. It is, however, an attractive political position, given that the NRA is the ATF’s principal enemy.”¹⁷

- **NRA as a “Bad Guy” Organization:** In notes on a memo regarding the Volunteer Protection Act, aimed at protecting non-profit volunteers from legal liability, Kagan apparently tied the NRA to the KKK as “bad guy” organizations that should not be included in the legislation.¹⁸
- **No Reassurance at Confirmation:** When Kagan was nominated to her current role as Solicitor General, she was asked about her views on the U.S. Supreme Court’s decision in *D.C. v. Heller*. Kagan refused to express support for the decision and failed to give any personal views at all regarding the case.¹⁹

12 Kagan memo to Justice Marshall in *Sandidge v. United States*, http://www.fed-soc.org/docLib/20100603_SecondAmendment.pdf.

13 Reed/Kagan memo to the President, May 21, 1999, Subject: DPC Weekly Report.

14 Reed/Kagan memo to the President, Nov. 13, 1997, Subject: DPC Weekly Report. See David Kopel, “Clinton staff: ‘We are taking the law and bending it as far as we can to capture a whole new class of guns.’ Kagan wrote the Clinton ban on gun imports.” May 11, 2010, <http://volokh.com/2010/05/11/were-bending-the-law-as-far-as-we-can-to-ban-an-entirely-new-class-of-guns-kagan-wrote-the-clinton-ban-on-gun-imports/>.

15 *Id.*

16 *Id.*

17 Mikva/Kagan memo to the Chief of Staff, Aug. 9, 1995, Subject: Federal Law Enforcement.

18 Kagan notes on Allegra/DOJ memo to Kagan, Mar. 27, 1996, Subject: Charities Bill.

19 Elena Kagan, Testimony before the Senate Judiciary Committee, Nomination to be Solicitor General, <http://documents.nytimes.com/elena-kagan-documents#document/p1>.

“In a memo regarding the Volunteer Protection Act, aimed at protecting some non-profit volunteers from legal liability, Kagan apparently tied the NRA to the KKK as ‘bad guy’ organizations that should not be included in the legislation.”

The Truth about Elena Kagan and Military Recruiters at Harvard

As Dean of Harvard Law School, Elena Kagan took a radical, hard-line public stand against the U.S. military’s “Don’t Ask, Don’t Tell” policy and treated military recruiters like second-class citizens by preventing them from recruiting on campus as every corporation or law firm was allowed to do.

- **Initial Open Policy:** When Kagan became Dean of Harvard Law School in 2003, she inherited a policy of open access for U.S. military recruiters. Though Harvard Law had long banned the U.S. military from recruiting on campus, in 2002 the school chose to relent on its policy upon learning that it would cost the university more than \$300 million in federal funding.
- **Criticism of “Don’t Ask, Don’t Tell”:** But soon after becoming dean, Kagan began criticizing the “Don’t Ask, Don’t Tell” policy, writing to all students, including veterans and future JAG officers, that it is “a profound wrong—a moral injustice of the first order.”²⁰ While Kagan directed her ire at the military itself, in fact the policy is a matter of federal law—passed by a Democratic Congress and signed by President Clinton—and the military is not at liberty to change it.
- **Third Circuit Ruling:** In November 2004, the U.S. Court of Appeals for the Third Circuit declared the Solomon Amendment unconstitutional.²¹ (The Solomon Amendment is the colloquial name for the law that allows the federal government to withhold funds from universities that bar the military from recruiting on campus.) Even though Harvard is not in the Third Circuit, and despite the fact that the Third Circuit blocked its own ruling from taking effect while the Supreme Court reviewed it, **Dean Kagan disregarded the law and immediately reinstated Harvard’s recruiting ban** on the basis that she objected to the military’s policy toward homosexuals.²²
- **Effects:** Because of Dean Kagan’s decision, military recruiters were barred from recruiting through the law school’s on-campus career services process.
- **Reversal of Course:** When once again faced with the prospect of losing millions of dollars in federal funding, Harvard relented, but only after University President Larry Summers intervened.²³

“[S]oon after becoming dean, Kagan began criticizing the ‘Don’t Ask, Don’t Tell’ policy, calling it ‘a profound wrong—a moral injustice of the first order.’”

- **Amicus Brief:** When the Supreme Court took up the case, Kagan joined an amicus brief urging the Court to reject the Solomon Amendment.²⁴ Her extreme position was rejected by the Supreme Court in a **unanimous** decision.²⁵
- **Mischaracterizing Kagan's Views:** Recognizing the unpopularity of Kagan's radical views and her discriminatory treatment of the military, the Obama Administration and Senate Democrats have engaged in a **misleading campaign to re-characterize the facts.** According to Politico, "The administration maintains that under Kagan, the law school accommodated military recruiters on campus by allowing them to recruit and interview students through the Harvard Law School Veterans Association."²⁶
- **The Real Facts:** Kagan did not "accommodate" recruiters. To the contrary, the military considered Kagan's treatment "tantamount to chaining and locking the front door of the law school."²⁷ According to recently released documents, one key official in the Department of Defense called Kagan a "case in point" of saber rattlers who had "an intent to shout down the military."²⁸
- **Criticism from the Left:** Liberal commentator Peter Beinart put the issue plainly: "I think it showed bad judgment . . . You can disagree with the policies of the American military; you can even hate them, but you can't alienate yourself from the institution without in a certain sense alienating yourself from the country. **Barring the military from campus is a bit like barring the president or even the flag. It's more than a statement of criticism; it's a statement of national estrangement.**"²⁹

"Even though Harvard is not in the Third Circuit, and despite the fact that the Third Circuit blocked its own ruling [that the Solomon Amendment was unconstitutional] from taking effect while the Supreme Court reviewed it, Dean Kagan disregarded the law and immediately reinstated Harvard's recruiting ban on the basis that she objected to the military's policy toward homosexuals."

20 Kagan e-mail, Oct. 6, 2003, Subject: [HLS] Military Recruitment, <http://www.hlrecord.org/2.4462/kagan-e-mails-school-1.580120>.

21 FAIR v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004).

22 Kagan e-mail, Sept. 20, 2005, http://www.law.harvard.edu/news/2005/09/20_recruiting.php

23 Katharine Q. Seelye, *Potential Court Pick Faced Dilemma at Harvard*, N.Y. TIMES, May 6, 2010, <http://www.nytimes.com/2010/05/07/us/politics/07kagan.html>.

24 Brief of Professors William Alford, et al., as Amici Curiae Supporting Respondents, Rumsfeld v. FAIR, 547 U.S. 47 (2006) (No. 04-1152), <http://www.law.georgetown.edu/solomon/documents/FAIRamicusHarvard.pdf>. She also joined an amicus brief of Harvard law professors in the Third Circuit. Brief of Professors William Alford,

et al., as Amici Curiae Supporting Appellants, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433), <http://www.law.georgetown.edu/solomon/documents/OMelvenyLawProfs.pdf>.

25 *Rumsfeld v. FAIR*, 547 U.S. 47 (2006).

26 Mike Allen, *Dems: E-mail Bolsters Kagan*, POLITICO, June 19, 2010, <http://mobile.politico.com/story.cfm?id=38755%cat=congress>.

27 Memo for Record, Apr. 18, 2002, Subject: Access to the Career Services Office, <http://www.redcounty.com/sites/default/files/Harvard%20Locked%20front%20door%202.pdf>.

28 Carr e-mail, Mar. 9, 2006, Subject: Solomon Olive Branch - Or Not.

29 Peter Beinart, *The Problem with Elena Kagan*, May 10, 2010, <http://www.thedailybeast.com/blogs-and-stories/2010-05-10/the-problem-with-elena-kagan/>.

Liberal commentator Peter Beinart: “I think it showed bad judgment You can disagree with the policies of the American military; you can even hate them, but you can’t alienate yourself from the institution without in a certain sense alienating yourself from the country.”

Elena Kagan Would Put Foreign Law Ahead of the U.S. Constitution

- **International Law Replaced the U.S. Constitution:** As Dean of Harvard Law School, Kagan led the effort to remake the law school’s curriculum by requiring first year students to take international and comparative law courses. A course on American constitutional law was notably absent from the list of required courses. In fact, under Kagan, law students could graduate from law school without ever reading our Constitution, but not without taking a class on international law.³⁰
- **Harvard Law’s International Mission:** According to a statement of Harvard Law’s educational philosophy posted during her tenure, “From the beginning of law school, students should learn to locate what they are learning about public and private law in the United States within the context of a larger universe—global networks of economic regulation and private ordering, public systems created through multilateral relations among states, and different and widely varying legal cultures and systems.”³¹
- **Praise of Barak:** In 2006, Kagan said that Israeli Judge Aharon Barak, one of the world’s most aggressive proponents of judicial activism, was her “judicial hero.” He “is the judge who has best advanced democracy, human rights, the rule of law, and justice.”³² Harvard Law School’s press release praised him for “championing an activist judiciary.”³³
- **Barak’s Judicial Philosophy:** Judge Barak has written that a judge “should adapt the law to life’s changing needs” and that to interpret the law “[t]he judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life’s changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.”³⁴

“[U]nder Kagan, law students could graduate from law school without ever reading our Constitution, but not without taking a class on internal law.”

30 Peter Winn, *As Harvard Law Dean, Kagan Did Not Require Study of U.S. Constitutional Law But Did Require Study of International and Foreign Law*, CNS NEWS, May 28, 2010, <http://www.cnsnews.com/news/article/66749>.

31 HLS Faculty unanimously approves first-year curricular reform, Oct. 6, 2006, http://www.law.harvard.edu/news/2006/10/06_curriculum.php. See also Elena Kagan, *The Harvard Law School Revisited*, 11 GREEN BAG 2d 475, 478 (2008) (“The courses in international and comparative law are opening up new questions and possibilities,

showing choices made by different societies and challenges that arise from globalization, while also helping every student to locate American law in the larger map of laws, politics, and histories across the world.”).

32 Rebecca Agule, *Distinguished Israeli Jurist Receives 2006 Justice Prize*, HARVARD LAW RECORD, Sep. 28, 2006, <http://www.hlrecord.org/2.4463/distinguished-israeli-jurist-receives-2006-justice-prize-1.578536>.

33 Israel’s Aharon Barak Receives Gruber Justice Prize, Sep. 21, 2006, http://www.law.harvard.edu/news/2006/09/21_barak.html.

34 Aharon Barak, *THE JUDGE IN A DEMOCRACY* 4 (Princeton University Press 2006).

“In 2006, Kagan said that Israeli Judge Aharon Barak, one of the world’s most aggressive proponents of judicial activism, was her ‘judicial hero.’ He ‘is the judge who has best advanced democracy, human rights, the rule of law, and justice.’”

Wrong on Free Speech

- **Views on the Right to Influence Elections:** Kagan wrote a memo for President Clinton arguing that the First Amendment does not protect the right to spend money to influence elections. Kagan stated that the Supreme Court was mistaken in its view “that money is speech and that attempts to limit the influence of money on our political system therefore raise First Amendment problems.” According to Kagan, “the Court should reexamine its premise that the freedom of speech guaranteed by the First Amendment always entails a right to throw money at the political system.”³⁵ Kagan’s refusal to consider political donations speech is puzzling in contrast with her position in her scholarly writing that nude erotic dancing should be protected under the First Amendment.³⁶
- **Punishing Free Speech:** In *Citizens United*, Kagan argued for significant restrictions on political speech. According to the Court, her proposed rule would mean that the federal government could punish the Sierra Club for running “an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association for publishing a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union for creating a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech.”³⁷
- **The Court’s Dismissal of Kagan’s Views:** As Chief Justice Roberts pointed out, Kagan’s view of the First Amendment “would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for offices, so long as the newspapers were owned by corporations—as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.”³⁸

“Kagan’s refusal to consider political donations speech is puzzling in contrast with her position in her scholarly writing that nude erotic dancing should be protected under the First Amendment.”

35 Reed/Weinstein/Jacoby/Waldman/Weber/Kagan, Memo for the Chief of Staff, Oct. 31, 1996, Subject: Possible Q&A on President's Campaign Finance Reform Announcement.

36 Elena Kagan, *Public Speech, Private Purpose*, 63 U. CHI. L. REV. 413, 499 (1996).

37 *Citizens United v. FEC*, 558 U.S. ____ (2010).

38 *Id.*

“As Chief Justice Roberts pointed out, Kagan’s view of the First Amendment ‘would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern.’”

Elena Kagan Prefers

Limitless Government Power

- **Kagan’s Criticism of *Seminole Tribe* Decision:** Elena Kagan wrote a memo for the White House Deputy Chief of Staff regarding the impact of the U.S. Supreme Court’s *Seminole Tribe v. Florida* decision (March 1996). In that case, the Court held that a federal statute was a violation of states’ sovereignty under the Eleventh Amendment.³⁹ The decision narrowed congressional power to legislate under the Commerce Clause. She acknowledged that the rule had “broad significance,” and “will doubtless stand in the way of at least some citizen suits brought to enforce federal law.” Her skepticism about states’ rights comes through clearly in her final paragraph: “[T]he decision, especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools, indicates a serious effort by a bare majority of the Court to reorient the balance of power between the federal government and the States. It is highly unlikely that this case will be the last one to pursue that states’-rights agenda.”⁴⁰
- **Kagan’s Criticism of *Lopez*:** In the same memo, she criticized the Court’s decision in *U.S. v. Lopez*, wherein the Court invalidated the Gun Free School Zones Act on the basis that it exceeded the national government’s authority.⁴¹
- **Kagan’s Criticism of *Morrison*:** A joint memo from Kagan and Bruce Reed recommended filing a petition for certiorari challenging the Fourth Circuit decision in *Morrison* invalidating the Violence Against Women Act under the Commerce Clause.⁴² Kagan expressed dismay that the decision would mean that plaintiffs would only be able to sue in state courts using state law.
- **An Attack on Federalism:** Each of these cases—*Lopez*, *Morrison*, and *Seminole Tribe*—is a landmark decision on the issue of the balance of power between the national and state government. From her opinions on these cases, we can conclude that she supports an expansive national government and has little regard for federalism, the Tenth Amendment, and other constitutional principles which would limit that power in areas like the federal takeover of health care.

“[Ms. Kagan] concluded, “[T]he decision [in *Seminole Tribe v. Florida*], especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools, indicates a serious effort by a bare majority of the Court to reorient the balance of power between the federal government and the States.”

39 517 U.S. 44 (1996).

40 Kagan memo to Harold Ickes, Mar. 31, 1996, Subject: *Seminole Tribe v. Florida*.

41 *Id.* (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).

42 Reed/Kagan memo to the President, Mar. 6, 1999, Subject: DPC Weekly Report (discussing *Brzonkala v. Virginia Tech*, 169 F.3d 820 (4th Cir. 1999)).

A Key Vote to Impose Same-Sex Marriage

Elena Kagan's extreme steps to punish the military for its prohibition on homosexual acts raise serious questions about her ability to put her personal views aside when gay rights activists challenge traditional marriage laws. This concern is reinforced by her actions as Solicitor General.

- **Vow to Defend Statutes:** During her confirmation hearing to become Solicitor General, Kagan made it clear that she believed it would be her responsibility to present a “vigorous defense of the statutes of this country against constitutional attack.”⁴³ She also stated that “I am fully convinced that I could represent all of the interests . . . of the United States as principally expressed in legislative enactments and executive policy . . . with vigor, even when they conflict with my own opinions. I believe deeply that specific roles carry with them specific responsibilities and that the ethical performance of a role demands carrying out these responsibilities as well and completely as possible.”⁴⁴
- **Defense of Marriage Act:** But when the Defense of Marriage Act was challenged in a California case, Kagan's office wrote in a brief that “this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal.”⁴⁵
- **No “rational basis” for marriage:** According to the brief, the Administration “does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing,” and the only reason they even filed a brief was that it “has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality.”⁴⁶
- **“Gift” to Gay Marriage Activists:** One prominent gay marriage proponent reacted to the brief by saying, “This new position is a gift to the gay-marriage movement. . . . The DOJ is helping knock out a leg from under the opposition to gay marriage.”⁴⁷
- **Faithful to Her Own Policy Preferences:** When nominated to become Solicitor General, Ms. Kagan took an oath to tell the truth and, under that oath, promised to defend the laws of the United States, including the Defense of Marriage Act. She has made it clear, however, that she is

“[W]hen the Defense of Marriage Act was challenged in a California case, Kagan's office wrote in a brief that ‘this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal.’”

willing to be faithful to that oath and to the law only when it does not interfere with her personal policy preferences.

43 Elena Kagan, Testimony before the Senate Judiciary Committee, Nomination to be Solicitor General, <http://documents.nytimes.com/elena-kagan-documents#document/p1>.

44 Elena Kagan, Responses to Questions Submitted for the Record by Senator Arlen Specter, <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/SolicitorGeneral-ElenaKagan.cfm#QFRs>.

45 U.S. Department of Justice, Reply Brief, *Smelt v. United States*, <http://lawdork.net/wp-content/uploads/2009/08/Smeltdomareplybrief.pdf>.

46 *Id.*

47 Dale Carpenter, “DOJ Boosts the Cause of SSM,” Aug. 17, 2009, http://volokh.com/archives/.archive_2009_08_16-2009_08_22.shtml#1250541892.

“[Kagan’s brief] is a gift to the gay-marriage movement. . . . The DOJ is helping knock out a leg from under the opposition to gay marriage.”

in the People