



## Solicitor General Elena Kagan

Elena Kagan (b. 1960) is the Solicitor General of the United States and the former dean of Harvard Law School. Solicitor General Kagan has an impressive academic and professional background. She graduated from Princeton University with honors, received her Master of Philosophy from Oxford, and obtained her J.D. with honors from Harvard, where she was the supervising editor of the Harvard Law Review. After law school, she clerked for Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit and Supreme Court Justice Thurgood Marshall. Kagan followed her clerkships with time in private practice as an associate at Williams & Connolly, LLP. In 1991, she moved to the academy as a professor at the University of Chicago School of Law, obtaining tenure in 1995. While teaching at the University of Chicago, she focused on administrative law and First Amendment issues, and she took on a special assignment as senior counsel to then-Senator Joe Biden, who was chair of the Senate Judiciary Committee.

Between 1995 and 1999, Solicitor General Kagan served as President Bill Clinton's Associate White House Counsel, deputy assistant to the President for Domestic Policy, and deputy director of the Domestic Policy Council. In 1999, President Clinton nominated her for a seat on the U.S. Court of Appeals for the D.C. Circuit, but the Senate Judiciary Committee, chaired by Orrin Hatch, never scheduled a hearing for her. In 1999, she became a visiting professor at Harvard Law School. In 2003 she was named the law school's first female dean, where she oversaw a \$476 million capital fundraising campaign and revamped the school's core curriculum. Last year, President Obama nominated her to be Solicitor General, and, despite some opposition because she had never argued a case before the Supreme Court, she was confirmed by the Senate, 61-31,<sup>1</sup> in March 2009, making her the first woman to hold the post. The Solicitor General is responsible for defending federal statutes, agency regulations, and executive branch actions in the Supreme Court and deciding which cases to appeal in the lower courts. Solicitor General Kagan made her first appearance before the Supreme Court in September 2009 to argue the government's position in *Citizens United v. Federal Election Commission*. In *Citizens United*, she defended the McCain-Feingold Act's restriction on corporate expenditures during election cycles.

Solicitor General Kagan's intellect and qualifications have been applauded across the political spectrum. When nominated to become Solicitor General, eight former solicitors general—including Ken Starr, Ted Olson, and Charles Fried—signed a letter supporting her nomination, as did conservatives Brad Berenson and Miguel Estrada, among others.<sup>2</sup> She is

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<sup>1</sup> Kagan received the votes of 54 Democratic Senators as well as Senators Coburn (R-OK), Collins (R-ME), Gregg (R-NH), Hatch (R-UT), Kyl (R-TX), Lugar (R-IN), and Snow (R-ME). The following Senators did not vote: Boxer (D-CA), Cochran (R-MS), Ensign (R-NV), Kennedy (D-MA), Klobuchar (D-MN), and Murray (D-WA).

<sup>2</sup> "HLS Faculty and Alums Endorse Kagan," available at <http://www.law.harvard.edu/news/spotlight/public-service/related/kagan-endorement.html>.

often praised for her ability to build coalitions. Many of her supporters point to her successful tenure as Dean of Harvard Law School as evidence of that trait. She was named dean during a contentious time in the school's history and is widely credited with breaking a logjam over faculty hiring and bringing in conservative scholars to address criticism that the faculty was too ideologically unbalanced.<sup>3</sup> Kagan's experience in the Clinton Administration also speaks to her ability to reach across aisles and produce results. She worked with Senator John McCain to develop new tobacco regulations. At the behest of Bruce Reed, her boss on the Domestic Policy Council, she would regularly take center to center-right positions on important issues.<sup>4</sup> Reed said that he relied on her for White House briefings because of her excellent ability to build consensus, stating "[s]he's a superb consensus-builder."<sup>5</sup>

One of the more controversial acts of her career was her opposition as dean of Harvard Law School to the Solomon Amendment, a federal law that allows the Secretary of Defense to deny federal grants to institutions of higher education if they bar military recruiters from campus. Numerous law schools had excluded military recruiters from campus recruiting programs because the military's "Don't Ask, Don't Tell" policy violated their campus nondiscrimination policies. Threatened with funding cuts to their entire universities, several law schools banded together to challenge the Solomon Amendment; when the case reached the Supreme Court, Dean Kagan and 39 other Harvard law professors signed an amicus brief urging the Court to invalidate the funding restriction. Dean Kagan has described "Don't Ask, Don't Tell" as "a moral injustice of the first order,"<sup>6</sup> and in an email to the Harvard Law School community regarding the lawsuit she wrote: "This is a difficult issue . . . I believe [this is] a core matter. I believe that discrimination against gays and lesbians seeking to enter military service is wrong—both unwise and unjust. And this wrong harms the fabric of our community by denying an opportunity to some of our students that other of our students have."<sup>7</sup> Initially, the Third Circuit enjoined enforcement of the Solomon Amendment, and Harvard returned to its policy of "nondiscrimination without exception" and exclusion of military recruiters. In 2006, in *Rumsfeld v. FAIR*, the Supreme Court, in an 8-0 decision, upheld the Solomon Amendment, holding that the amendment regulated conduct, not speech, and did not compel conduct in violation of the First Amendment. In another email to the law school community, Kagan wrote, "I am disappointed by this decision."<sup>8</sup>

Kagan's public record is silent regarding many issues that are likely to come before the Court. Her scholarly production is limited,<sup>9</sup> and most of her records from the Clinton White

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<sup>3</sup> Some have pointed out, however, that of the 32 tenure-track faculty hired during her tenure, none was African American or Latino and only seven were women. The sole minority hire was an Asian American female.

<sup>4</sup> Eric Lichtblau, "Potential Justice's Appeal May Be Too Bipartisan," *New York Times*, May 16, 2009, available at [http://www.nytimes.com/2009/05/17/us/17kagan.html?\\_r=2](http://www.nytimes.com/2009/05/17/us/17kagan.html?_r=2).

<sup>5</sup> *Id.*

<sup>6</sup> Nina Totenberg, "Solicitor General Holds Views Close To Her Chest," *NPR*, Oct. 22, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=121712227&ft=1&f=1070>.

<sup>7</sup> *Email from Kagan to HLS Community*, October 1, 2008.

<sup>8</sup> *Email from Kagan to HLS Community*, March 7, 2008.

<sup>9</sup> Kagan, Elena, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Kagan & David Barron, *Chevron's Nondelegation Doctrine*, 2001 S. CT. REV. 201 (2001); Kagan, *When A Speech Code Is A Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. DAVIS L. REV. 957 (1996); Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 UNIV. OF CHIC. L. REV. 413 (1996); Kagan, *Confirmation Messes, Old and New*, 62 UNIV. OF CHIC. L. REV. 919 (1995) (book review); Kagan,

House remain unavailable to the public. Additionally, she reported to others while at the White House, making it difficult to separate her policy views from those of her superiors. Similarly, as Solicitor General she represents the government and is expected to defend its institutional interests, within limits. Indeed, the Solicitor General has an obligation to defend the validity of a federal statute unless there is no reasonable argument that can be made. It is very rare for the Solicitor General to refuse to defend on appeal a conviction obtained by the federal government at trial. Her record as Solicitor General, therefore, must be approached with care.

There are, however, a few items of Kagan's public record that give clues about her views on important issues. Her scholarship and statements suggest an expansive view of presidential power. In a law review article published in 2000,<sup>10</sup> she advocated for broad presidential control over administrative agencies: "I suggest . . . that most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President."<sup>11</sup> Similarly, she expressed a broad understanding of the Commander-in-Chief power at her confirmation hearing when she suggested that persons detained as enemy combatants could be detained indefinitely for the remainder of the conflict (a "war without end") as long as there was a transparent process—affording some due process via an independent judiciary—to make the "enemy combatant" determination. This level of due process is a far cry from the right to *habeas corpus*. Consistent with these views, during her tenure as Solicitor General, the government has fought the extension of habeas rights to detainees being held by the U.S. military at the Bagram air base in Afghanistan and has consistently opposed the authority of federal courts to order the release of detainees.

During her confirmation hearing, Kagan expressed favor towards continuing use of the state secrets privilege stating, "I will work with the Attorney General and others at the Department of Justice and across the agencies to ensure that the United States invokes the state secrets privilege only in legally appropriate situations."<sup>12</sup> During her tenure as Solicitor General, the government has routinely invoked the state secrets privilege in cases involving national security, most notably in litigation challenging the NSA's surveillance program; critics have noted that these positions do not differ significantly from the Bush Administration's policies on these issues.

As Solicitor General, Kagan has defended the government's successful convictions. She has also reached out to oppose positions taken by criminal defendants even when the United States was not a party to the appeal. In *Padilla v. Kentucky*, the Supreme Court held that a defense attorney's representation is constitutionally ineffective when he or she fails to advise a client that a guilty plea carries a risk of deportation and that an attorney has the duty to provide correct advice when the deportation consequence is truly clear. Kagan had urged the Court to

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*For Justice Marshall*, 71 TEX. L. REV. 1125 (1993); Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197 (1993) (book review); Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 UNIV. OF CHIC. L. REV. 873 (1993); Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 S. CT. REV. 29 (1992)

<sup>10</sup> 114 HARV. L. REV. 2245.

<sup>11</sup> *Id.* at 2320.

<sup>12</sup> *Kagan Responses, Written Questions of Chairman Patrick Leahy for Elena Kagan*, available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.

conclude that the Sixth Amendment applies only to the extent that a defense attorney had affirmatively given incorrect advice. In *Montejo v. Louisiana*, she urged the Supreme Court to overrule *Michigan v. Jackson*, a 1986 decision assuring that the right to counsel is not lost during police interrogation, which it did in a 5-4 ruling written by Justice Scalia. The 1986 ruling held that once an accused has claimed the right to counsel in court, any waiver of that right during police interrogation would not be valid unless the accused had initiated the communication with the police. Kagan filed an *amicus* brief on the government's behalf in *Montejo* arguing that the 1986 rule served no real purpose and should be discarded, even though it occasionally prevents federal prosecutors from obtaining appropriate convictions. A group of former senior DOJ officials, former federal and state prosecutors, and former judges also filed an *amicus* brief, opposing the position taken by Kagan and arguing that *Jackson* provided a bright-line rule that had become embedded in routine police practice, just as *Miranda* had. A group of public defenders also filed an *amicus* brief in support of the *Jackson* rule, describing it as essential to their ability to provide effective assistance of counsel under the Sixth Amendment.

Notably, in one oral argument in which the United States was a party, *Robertson v. United States ex rel. Watson*, Solicitor General Kagan suggested that a plea agreement signed by a U.S. Attorney's Office binds only that office, so federal prosecutors elsewhere may not be bound by the agreement. Chief Justice Roberts replied that her position was "absolutely startling."<sup>13</sup>

Solicitor General Kagan's views regarding the Establishment Clause have evolved over the years. In 1987, then-clerk Kagan wrote in a memorandum to Justice Marshall that federal grants to religious organizations under the Adolescent Family Life Act violated the Establishment Clause of the First Amendment (although the Court ultimately ruled 5-4 to uphold the grants). At the time, Kagan wrote, "[i]t would be difficult for *any* religious organization to participate in such projects without injecting some kind of religious teaching . . . when the government funding is to be used for projects too close to the central concerns of religion, *all* religious organizations should be off limits"<sup>14</sup> (emphasis in original). Yet, in response to written questions by Senator Sessions during her Solicitor General confirmation process, she wrote, "I indeed believe that my 22-year-old analysis, written for Justice Marshall, was deeply mistaken. It seems now utterly wrong for me to say that religious organizations generally should be precluded from receiving funds for providing the kinds of services contemplated by [the Act]."<sup>15</sup> More recently, in *Salazar v. Buono*, Solicitor General Kagan asserted during oral argument that the Establishment Clause was not violated when a private group displayed a Christian cross in the Mojave desert as a war memorial since the government transferred the land on which the cross stood to a third party.

Kagan is a strong believer in the role *stare decisis* plays in reproductive rights policy. During her confirmation process, she stated, "[u]nder prevailing law, the Due Process Clause of

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<sup>13</sup> Jesse J. Holland, "Supreme Court Notebook: Looking Ahead for Tips," *AP*, April 1, 2010, available at <http://www.google.com/hostednews/ap/article/ALeqM5iKv5SFe5VEnv-AXRCHFdKvq-ldvwd9EQ4HG00>.

<sup>14</sup> Quoted in *Kagan Responses, Questions for the Record for Elena Kagan Submitted by Senator Jeff Sessions* (emphasis in original), available at

<http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.

<sup>15</sup> *Id.*

the Fourteenth Amendment protects a woman’s right to terminate a pregnancy, subject to various permissible forms of state regulation. As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.”<sup>16</sup>

Kagan has sterling academic qualifications and has performed as an exceptionally able lawyer with a high regard for the law and its importance in the lives of ordinary Americans. As is always the case, Alliance for Justice will continue to look at all documents and records as they become available in order gain a greater understanding of her views and insights about the law.

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*For more information, contact the Alliance for Justice, [www.afj.org](http://www.afj.org), 202.822.6070*

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<sup>16</sup> *Kagan Responses, Written Questions of Senator Chuck Grassley, available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.*