Section 2: Elena Kagan and the Court

Institute of Bill of Rights Law at The College of William & Mary School of Law

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II. Elena Kagan and the Court

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President Barack Obama is expected to nominate Solicitor General Elena Kagan to the Supreme Court, choosing a woman who has worked in elite legal and policy jobs but has never served as a judge, people familiar with the matter said Sunday.

The selection is to be announced Monday. If confirmed by the Senate, she would succeed retiring Justice John Paul Stevens, the 90-year-old leader of the court’s liberal wing.

In making his choice, aides said the president looked for someone with not only a top legal mind but also the ability to bring people of differing views together. With the Supreme Court closely divided ideologically, the president is hoping his pick will be a leader who can build majorities in close cases.

He saw that quality in Ms. Kagan, who earned a reputation for bridging divides as a policy adviser in the Clinton White House and, in particular, over six years as dean of Harvard Law School. At Harvard, she aggressively recruited new faculty of all ideological stripes and went out of her way to make sure conservatives felt comfortable on the left-leaning campus. She won accolades from colleagues and students across the political spectrum.

Conservatives with whom she has worked are likely to endorse her nomination, providing helpful support as the Senate considers the matter. The White House has already lined up people willing to speak out on her behalf, including conservatives, women’s groups and public interest law advocates.

Liberals are likely to support her, but both liberals and conservatives who are active on judicial policy say they have concerns because Ms. Kagan lacks a public record on issues that are important to them. Discerning her views may be more difficult than it would be for a judge who has handled many cases.

Opponents of her nomination are certain to raise questions about her decision, as Harvard law dean, to sign a friend-of-the-court brief arguing that law schools did not have to allow the U.S. military to recruit on campus because the don’t-ask, don’t-tell policy barred gays from serving openly.

She and other law deans argued the rule violated their antidiscrimination policies, and Ms. Kagan called the policy “profoundly wrong.” But they were overruled by a unanimous Supreme Court.

The official announcement on Monday will kick off a months-long effort to sell the nomination to the public and to the Senate, where Democrats hope for a final vote before the August recess.

Advocates on both sides of the political spectrum predicted that, absent new information coming to light, Ms. Kagan would probably be confirmed with at least a handful of Republican votes. Last year, the Senate confirmed her as solicitor general on a 61-31 vote, with seven Republicans voting yes.
Mr. Obama has known Ms. Kagan since they were law professors together at the University of Chicago in the early 1990s. At age 50, she would be the youngest justice on the court, and she could provide Mr. Obama a legacy for decades to come. She was the youngest of the four candidates Mr. Obama interviewed.

The other three all serve on the federal appellate bench, the farm team for Supreme Court nominees in recent decades. They were Merrick Garland of Washington, D.C.; Diane Wood of Chicago; and Sidney Thomas of Billings, Montana.

Judge Thomas was the least well known of the three, the only one not to be also considered for Mr. Obama's first Supreme Court appointment.

Judge Wood was seen as having the most liberal record of the four, and she was the candidate many liberal groups were rooting for. Judge Garland, who as a Justice Department official in the 1990s oversaw the prosecutions of Oklahoma City bomber Timothy McVeigh and Unabomber Theodore Kaczynski, was considered the easiest to confirm because many Republicans are on the record praising him.

After graduating from Harvard Law School in 1986, Ms. Kagan clerked for federal appeals Judge Abner Mikva, who was a mentor to generations of Democrats, including Mr. Obama, and then clerked for Supreme Court Justice Thurgood Marshall. She spent two years at the prestigious Washington law firm Williams & Connolly, the only time she practiced law in the private sector.

In 1993, then-Sen. Joseph Biden (D., Del.), chairman of the Senate Judiciary Committee, hired Ms. Kagan as a special counsel during confirmation proceedings for President Bill Clinton's first Supreme Court nominee, Ruth Bader Ginsburg.

She was a domestic policy adviser in the Clinton administration, helping implement a sweeping overhaul of welfare law and working with Congress on legislation allowing the government to regulate tobacco, a measure that did not become law until long after she left.

In 1999, Mr. Clinton nominated her to serve as a federal appellate judge, but she never received a hearing in the Republican Senate. She returned to Harvard that year and was made dean in 2003.

In earlier eras, Supreme Court justices came from a variety of backgrounds, but Ms. Kagan would be the first nonjudge since Nixon appointees Lewis Powell and William Rehnquist in 1972.

Some welcome that diversity, such as Senate Judiciary Committee Chairman Patrick Leahy (D., Vt.), who has repeatedly called for a nominee outside the "judicial monastery." But others, including the top Republican on the Judiciary Committee, Alabama Sen. Jeff Sessions, have questioned whether someone who has never been a judge has the experience or track record to serve on the nation's highest court. Ms. Kagan would be the third woman on the nine-member court, a record, and just the fourth in U.S. history.

But Mr. Obama bypassed the opportunity to diversify the court in other respects. Like the eight justices she would join, Ms. Kagan was educated at Ivy League universities, earning her undergraduate degree at Princeton and attending law school at Harvard. The court is dominated by people from the East Coast; she, too, was born in
New York City and has spent most of her career in Washington and Boston.

She is Jewish, meaning the court would, for the first time, have no Protestants. With her, membership would include three Jews and six Catholics.

Some conservatives expressed concerns about the paucity of information on Ms. Kagan's views.

"It's a return to a stealth nomination because she has no judicial record," said Manuel Miranda, chairman of Third Branch Conference, a politically conservative coalition, and a former Republican Senate staffer on judicial matters.

"I like her," he added. "I think she would be possibly the best nomination that conservatives might want. But the bottom line is, from a nonpartisan nonideological point of view, she is not very well qualified for the court."

Not all liberals were cheering a Kagan pick. They cited, among other things, scattered hints that Ms. Kagan might hold hawkish-leaning views about terrorism detentions.

Ms. Kagan's scholarly work has focused on two legal topics: free expression and administrative law. While both are significant parts of the Supreme Court docket, that leaves few public statements on a host of issues likely to confront the justices in the years ahead, including the rights of criminal defendants and suspected terrorists, the extent of federal authority over the national economy and social questions such as abortion and gay rights.

But while neither the public nor the Senate Judiciary Committee may know Ms. Kagan's approach to such questions, the Obama administration has had a year to evaluate her legal thinking. As solicitor general, she is the administration's chief legal advocate before the Supreme Court, a position that gives her a role in virtually every important legal issue that could involve the federal government.

In effect, Ms. Kagan has had an opportunity to privately audition her jurisprudence before the president and his advisers, on both substantive issues and in litigation strategies to secure the five votes needed to prevail at the Supreme Court.

Moreover, Ms. Kagan's experience in the executive branch could be reassuring to an administration that could face a more hostile Congress after midterm elections in November.

As a White House aide in the Clinton administration's second term, she worked to advance Democratic domestic policy initiatives opposed by a Republican Congress. After leaving government, she leveraged that into her signature academic work, a June 2001 Harvard Law Review article describing ways for an activist president to achieve his goals by asserting inherent constitutional powers and through vigorous use of regulatory authority delegated by law.
Now that Elena Kagan is officially the White House’s Supreme Court nominee, pundits have launched themselves into their CSI-worthy project of sorting through tiny filaments of evidence for her true ideological views. With no judicial record to pore over, and some of the wonkiest law-review articles ever penned to her credit, Kagan has mastered the fine art of nearly perfect ideological inscrutability. Even Jeffrey Toobin, her law school study partner, has virtually no idea what she really believes. That only makes us more determined to sift through the dry-cleaning slips and the Post-it notes to try to guess at who the real Elena Kagan might be. And since she has been hard to know, we struggle to find someone else we might compare her to. Paul Campos, a law professor at the University of Colorado, has (fairly ridiculously) compared Kagan to Harriet Miers. Andrew Cohen has compared her to Chief Justice John Roberts.

So we’ve begun another round in the judicial confirmation game of “my trace DNA evidence is better than yours.” A letter Kagan co-authored in 2005 condemning a court-stripping proposal for suspected terrorists at Guantanamo Bay will hearten the left. Her statement at her 2009 confirmation hearing that the president could detain enemy combatants without trial will make liberals very nervous. Kagan’s refusal to find a right to same sex-marriage in the Constitution may provide some small comfort to conservatives. But the fact that she was strongly and vocally opposed to military recruitment at Harvard Law School until the courts forced her to rescind her policy suggests a willingness to fight for liberal causes. We will debate the ambiguous evidence of Kagan’s views on executive power for weeks without knowing much of anything. . . .

It’s not quite that Kagan offers something for everybody. It’s more that she offers nothing, so there is something for everybody to wail about.

What nobody disputes about Kagan is that she is terrifically intelligent, an able manager, ambitious, and well-liked and that she was all that and a wheel of brie when it came to sorting out the problems she inherited as dean of Harvard Law School. She ran the most successful fundraising campaign in law-school history and attracted important right-wing thinkers to campus. Nobody (beyond Glenn Beck) has ever accused Kagan of being a liberal firebrand or a wild-eyed idealist. And while some of her supporters suggest that she may prove far more liberal than anyone expected, another Kagan fan told Nina Totenberg this past weekend that “Elena is the single most competitive and most inscrutable person I have ever known.”

It’s perfectly clear that Kagan brings the same qualities to the court that Obama prizes in politics generally: She has staked her professional career on reaching across the aisle and showing respect for all viewpoints. It’s one of the reasons her greatest fans include Ted Olson and Charles Fried. And that’s why the interesting
question is how serious the GOP effort to scuttle her nomination will be. Yes, they are already muttering about her inexperience and her rampant Harvard-ness. But ultimately, how do you wage an epic world war over a constitutional sphinx?

This morning, Bob Schieffer predicted that the confirmation fight to get Kagan onto the high court will be “a really bitter and vicious one.” While she was eminently qualified, he said, he noted that it’s an “especially toxic election year.” On the very same show, however, CBS legal correspondent Jan Crawford predicted that the battle would not be contentious at all: “She’s very engaging very challenging, she’s quite dynamic in her personality,” she said, “and you see that when she’s arguing cases before the Supreme Court. The justices really like her—you should see Justice Scalia (obviously a conservative) and Kagan going back and forth.”

I confess that I haven’t always seen Kagan as enormously successful with the court’s conservative wing, although she has always been conversational and collegial with them. That’s largely because one has to argue before the court dozens of times to become truly expert at it, and Kagan’s first oral argument at the high court last fall was also her first oral argument, period. In her total of six arguments at the Supreme Court, some of us have seen less playful banter than all out friction, most notably between Kagan and the chief justice. And it’s not clear to me that she’s had a profound influence on Justice Kennedy’s views yet, either. It can be true, from my observation, that the justices are hardest on the lawyers they like best and trust most. But it’s hard to see Kagan’s performances thus far at oral argument recommending her for the court.

That said, I’m not certain excellence at oral argument always predicts judicial excellence, and it’s possible that the qualities (or lack thereof) Kagan has brought to her role as solicitor general make her an even more attractive justice. Just as some have argued that Kagan’s lack of important academic scholarship makes her better suited for the court, there is a strong argument to be made that Kagan’s understated, even mellow, outings as SG show that she will approach the job of Supreme Court justice just as Obama would wish: open-minded, scrupulously fair, and always willing to concede error (so much so that she has sometimes been faulted for giving too much ground on Citizens United). She is always measured and polite. In fact, if you listen to her oral argument in the Citizens United case, you may well be struck by the fact that it’s Roberts who plays the role of oral advocate while Kagan seems to be striving for cautious centrist.

Six appearances before the Supreme Court don’t tell us much about an advocate’s ideology. Kagan was representing the Obama administration and defending federal statutes. But to the extent she betrayed her own judicial temperament in these outings, Kagan’s performances reveal a good deal about the kind of justice she may be: careful, narrow, and mild.

This brings us back to Obama’s announcement this morning, a statement that hammered home the two key prongs of the president’s judicial vision: centrist and hating on the Roberts court. Kagan, noted Obama, is a proponent of bipartisanship, of “understanding before she disagrees” and of seeking “common ground.” So far so good. But then the president tried to make her the face of opposition to the Citizens United decision, a decision so staggeringly unpopular that Obama has been campaigning against it since January. Introducing America to Kagan today, the president tried to turn her loss in that case
into a big win for populism: "During her time in this office, she has repeatedly defended the rights of shareholders and ordinary citizens against unscrupulous corporations," Obama said, adding, "In the Citizens United case, she defended bipartisan campaign finance reform against special interests seeking to spend unlimited money to influence our elections."

It's a fine needle the president is trying to thread: positioning Kagan as a bipartisan consensus-builder who is also going to knock some sense into the right-wing corporate ideologues on the court. Adam Liptak has already detailed how Kagan actually abandoned Obama's legal theory of Citizens United (that "in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens") by the time she argued the case. In other words, Kagan may not hold Obama's view of the case, and she may not be inclined to campaign against it at her hearings.

It's not at all clear from her record whether Kagan will someday prove to be the Jurist for the Little Guy or the Judge Who Bridged the Partisan Divide. There is ample evidence in her professional and academic record that she has ably managed to do both at different times, depending on the professional position she held and whose views she was representing. We will hear a good many testimonials in the coming weeks that Kagan has the heart of a progressive lion and the political skills of a diplomat. What remains to be seen is whether she will put the former to service in the interest of the latter—or vice versa.
One of the prevailing criticisms of President Obama’s choice of U.S. Solicitor General Elena Kagan for the Supreme Court is that she has never been a judge.

Senate Republicans in particular see it as a problem for this nominee. Senate Republican leader Mitch McConnell says the court “does not lend itself to on-the-job training.” Texas Sen. John Cornyn, a member of the Senate Judiciary Committee, asserts that, “Most Americans believe that prior judicial experience is a necessary credential” for a justice.

Yet, those remarks account for only recent nominations and defy the sentiment of Democratic senators such as Senate Judiciary Committee Chairman Patrick Leahy that experience outside “the judicial monastery” is valuable.

Kagan began meeting with Senate leaders, including Leahy and McConnell, on Wednesday.

Historically, presidents routinely sought nominees from beyond the bench. Of the nine justices on the court that decided the 1954 landmark Brown v. Board of Education, leading to school integration, only one had been elevated from a lower court. Sherman Minton, who earlier had been a U.S. senator, was appointed in 1949 directly from a federal judgeship. Chief Justice Earl Warren, who presided 1953-69, had been governor of California.

William Rehnquist, who was chief justice before the current Chief Justice John Roberts, had no judicial experience before taking his seat in 1972. President Nixon nominated him in fall 1971. Rehnquist had been an assistant attorney general for the Office of Legal Counsel.

Rehnquist, along with Lewis Powell, who was a Richmond lawyer and former head of the American Bar Association, were the most recent appointees named without having previously worn the black robe.

“In principle, more experience is always better than less,” says Harvard University law professor Richard Fallon. “It would be ideal to have someone who had been a trial lawyer and a trial court judge, an appellate lawyer and appellate judge, someone who had experience in the executive branch, someone who had worked on Capitol Hill, someone who had served in the military, and more. But no actual person can have all possible experiences that might be helpful, and I don’t think that being an appellate judge is any more necessary than the others.”

Kagan, 50, has been U.S. solicitor general since March 2009. Before that, she was dean of Harvard Law School. She served in the Clinton administration, taught at the University of Chicago and worked for a Washington law firm.

At Kagan’s Senate Judiciary Committee hearings for the solicitor general post in February 2009, she addressed concerns about her lack of experience, in that case that she had never argued before the justices: “When you get up to that podium at the Supreme Court, the question is much less how many times you have been there.
before than what do you bring up with you. And I think I bring up some of the right things.”

More than half of the 20th-century appointees did not come directly from lower courts. The bench was filled with justices who had been U.S. senators, such as Hugo Black; U.S. attorneys general, such as Robert Jackson; and governors, such as Francis Murphy of Michigan and Warren.

Thurgood Marshall, who served 1967-91, was the last justice who had been a U.S. solicitor general. Marshall, the nation’s first African-American justice, had earlier been an appeals court judge—unlike Kagan.

Some Republican senators who have criticized Kagan’s lack of judicial background applauded that trait in Harriet Miers in 2005. When President Bush nominated then-White House counsel Miers, Cornyn said, “She would fill some very important gaps in the Supreme Court, because right now you have people who have been federal judges, circuit judges most of their lives, or academicians.” Miers pulled out amid broad criticism.
“The Times, They Are A-Changin’”

SCOTUSblog
May 10, 2010
Lyle Denniston

Elena Kagan was not quite four years old when Bob Dylan’s studio album, “The Times, They Are a-Changin’,” was released 46 years ago. But that might well be the theme song for the Supreme Court, when Solicitor General Kagan, as now seems likely, takes the seat soon to be vacated by Justice John Paul Stevens. The third woman on the bench, and the youngest of three Justices in their fifties, Kagan could well be an agent of that change. A glaring fact: she is nearly three generations younger than the man she would replace.

As the days wound down this past week toward Kagan’s selection by President Obama, the nation could look West and East and see cultural conventions on the verge of change, much along the lines of Dylan’s title track. At the Salt Palace Convention Center in Salt Lake City, a Republican U.S. Senator who is a Mormon and has absolutely solid conservative credentials was dumped by his own party. In Boston, some 2,400 miles—and perhaps a world-away, the gay rights movement got a serious hearing in the Moakley U.S. Courthouse on its plea to change the nation’s legal perception of marriage.

What those events have in common, though, is that both will figure in the fight over the future of the Supreme Court that begins later this morning with the announcement of Kagan’s nomination, and both will influence, in coming months and years, the political pressures on the Court.

In Salt Lake City, the still young but already politically grown-up Tea Party movement was in the process of changing the face of American politics, denying nomination to GOP stalwart Robert Bennett, in a demonstration much more convincing than even the surprise January replacement of the late Sen. Edward Kennedy with Sen. Scott Brown in Massachusetts, and at least as convincing as driving Florida Gov. Charlie Crist out of the GOP to run for the Senate as a frantically struggling independent.

The Senate—and especially the Senate’s Republicans and some centrist Democrats—will no doubt read some special significance into Bennett’s political demise. Already, the Tea Party activists in Utah are boldly saying that Sen. Orrin Hatch, a longtime leader of the Senate Judiciary Committee, will be next to feel their displeasure with Washington.

Whatever the long-term future of the Tea Party is as a political movement, its early show of power and the knack to use it will, in the short term, deepen the partisan rancor in Washington and perhaps the nation, and the processing of Kagan’s nomination may well be affected to some degree. She is a product of the nation’s liberal Northeast, born in Manhattan, and tutored in the corridors of power. She definitely will not be a poster figure for the Tea Party.

Moreover, the social conservatism that is so much a part of the Tea Party agenda is likely to have a significant limiting effect on President Obama’s legislative initiatives over the next two-plus years, and that inevitably will alter the policy agenda that translates into legal controversy before the Supreme Court. Already, under pressure that can be traced directly to recent terrorist incidents, the Obama Administration is
talking of narrowing the constitutional right to "Miranda warnings" for terrorism suspects—posing a major test for the Court. And Congress’s attempt to seize control over detention policy is forcing the Administration’s hand about Guantanamo, risking a potential confrontation with the Court.

Tea Party resistance to the health care reform law, and the effect that resistance has so far had in stirring up legal challenges to that law, may test the current Supreme Court’s tolerance for expansive government involvement in the economy. That could spill over into disputes over Washington superintendence of the financial industry. Where Kagan would come out on such issues could well be tested during Senate review of her nomination.

Still, there is a counter-current running in American culture, and Kagan has been a part of that. This is the spread of tolerance of gay people, a phenomenon that is particularly evident in the attitudes of younger generations. Just a few years ago, it would have been astonishing for eight same-sex couples to show up in a federal court, demanding equality not for their sexual orientation but, of all things, for their marriage. They were married in Massachusetts, and have now sued in federal court to challenge some of the denial of equal benefits to spouses that Congress mandated in the Defense of Marriage Act.

Their case in the federal courthouse in Boston is running almost simultaneously with a challenge in federal court in San Francisco to the constitutionality of Proposition 8—that state’s ban on gay marriage. Both of the cases illustrate that issues of gay equality will reach the Supreme Court, and sooner than had once been expected. Not far behind them, very likely, will be new issues over the don’t ask-don’t tell policy against gays serving in the U.S. military—a policy that Kagan, at Harvard Law School, energetically resisted.

These issues, too, almost certainly will play some role in the review of Kagan’s nomination. The Court that she would join has already established itself as significantly more tolerant of gay equality than much of political America is or is likely soon to be. But the marriage equality issue may be a supreme test of that tolerance.

For the time being, Kagan can anticipate that, on many of the heavy controversies that come before the Court, she may not have much opportunity to exert significant influence. The more committed of the Court’s conservative Justices have been having increasing success in drawing swing Justice Anthony M. Kennedy to join them in major cases, and that makes a five-Justice majority that simply may not need Kagan’s vote, even if it were available. Although known for her skills at persuasion, Kagan is but a fifty-year-old with no prior experience in shaping judicial majorities.

Though nominally taking the Stevens seat, she has very little chance, in her early years, of developing the capacity that he had so successfully mastered in drawing Justice Kennedy, sometimes surprisingly, to the liberal side.

Still, Kagan, just because she is only 50, could share the perspective of her emergent generation with her older colleagues, and perhaps persuade them, now and then, to see what the post-Bob Dylan age has become.
As a young graduate student, Elena Kagan wrote that it was “not necessarily wrong or invalid” for judges to “try to mold and steer the law” to achieve social ends, but warned that such rulings must be rooted in legal principles to be accepted by society and endure.

Ms. Kagan, the nation’s solicitor general and President Obama’s nominee to the Supreme Court, gave an expansive view in a 1983 thesis of both the potential and the limits of the court’s ability to make change in society amid the rise of the conservative backlash against the liberal rulings of previous decades.

“There is a fundamental principle that governs the relationship between the law and the political process,” she wrote. “The Constitution vests a limited amount of power in the elected branches as a check on the activity and the decisions of the courts.”

Ms. Kagan added that “social justice” must be accompanied by legal rationale. “Judicial opinions may well appeal to the ethical sense—but this alone is not enough,” she wrote. “In order to achieve some measure of permanence in an ever-fluctuating political and social order, judicial decisions must be plausibly rooted in either the Constitution or another accepted source of law.”

The thesis, which was sent to the Senate on Tuesday, was an analysis of the so-called exclusionary rule that bars prosecutors from using evidence gained illegally. Ms. Kagan was critical of a liberal ruling not for its judicial activism or its efforts to achieve a form of social justice, but because it was not more rigorously grounded in a legal foundation that would survive future attacks. The analysis reflected the views of a nearly 23-year-old Oxford student who had not yet gone to law school, and her thinking may have evolved. Indeed, when she was made solicitor general last year, she rejected the role of courts in leading the way toward social justice. “It is a great deal better for the elected branches to take the lead in creating a more just society than for the courts to do so,” she wrote.

But the thesis does offer a window into the roots of Ms. Kagan’s legal and political philosophy that is likely to attract scrutiny during her confirmation hearings. Conservatives cite the notion that courts should consider social ends as an example of improper judicial activism. Since Ms. Kagan has never been a judge, she has fewer writings to define her theories.

The thesis was among more than 6,000 pages of documents sent to the Senate on Tuesday, including over 200 pages of answers to a questionnaire and articles, speeches and other papers requested by senators. Many of the papers were released during her confirmation as solicitor general, but both parties will spend coming days
mining them for clues to her thinking.

Among issues that have arisen is her view of executive power. In summarizing a 2005 panel discussion, Ms. Kagan described as "a little bit scary" the view that "there aren't really any legal constraints" on the president's authority to fight terrorism.

The papers sent to the Senate indicated that the White House began contacting candidates for the Supreme Court at least a month before Justice John Paul Stevens announced he was retiring. Ms. Kagan wrote that she was first contacted by the White House counsel, Robert Bauer, on March 5. Justice Stevens did not disclose his plans until April 9.

In her answers to the questionnaire, Ms. Kagan promised that if confirmed she would not participate in any case for which she signed the government's briefs while solicitor general. She disclosed that her net worth jumped more than $750,000 over the past year to $1.76 million, apparently the result of the sale of a home she bought in 2004.
Former Solicitors General Endorse
Elena Kagan for Solicitor General

Letter to the Senate Judiciary Committee
January 27, 2009

Walter Dellinger & Theodore Olson, on behalf of Charles Fried, Kenneth W. Starr, Drew S. Days III, Seth P. Waxman, Paul Clement & Gregory G. Garre

Dear Chairman Leahy and Senator Specter:

We who have had the honor of serving as Solicitor General over the past quarter century, from 1985 to 2009, in the administrations of Presidents Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush, write to endorse the nomination of Dean Elena Kagan to be the next Solicitor General of the United States. We are confident that Dean Kagan will bring distinction to the office, continue its highest traditions and be a forceful advocate for the United States before the Supreme Court.

Elena Kagan would bring to the position of Solicitor General a breadth of experience and a history of great accomplishment in the law. She has served as a law clerk to Supreme Court Justice Thurgood Marshall, she has been in private practice at one of America’s leading law firms, she has served in the office of the Counsel to the President, she has been a policy advisor to the President, she has been a legal scholar of the first rank at two of the nation’s leading law schools, Harvard and Chicago, and her research and writing in the fields of constitutional and administrative law will be highly relevant to the substantive work of the office. Most significantly, Kagan has been regarded as one of the most successful law school deans in modern times. All these experiences and accomplishments will serve her well in fulfilling the complex responsibilities required of the Solicitor General.

The well-deserved stature that Kagan has achieved in the legal profession will enhance her tenure as Solicitor General, ensuring that, within the executive branch, her voice and the conclusions reached by the office of the Solicitor General will be accorded the highest respect. The extraordinary skill she has demonstrated in bringing to Harvard an impressive array of new scholars, her ability to manage and lead a complex institution, and the high regard in which she is held by persons of a wide variety of political and social views, suggest that she will excel at the important job of melding the views of various agencies and departments into coherent positions that advance the best interests of the national government.

She will be a strong voice for the United States before the Supreme Court. Her brilliant intellect will be respected by the Justices, and her directness, candor and frank analysis will make her an especially effective advocate.

We are confident that Elena Kagan, if confirmed, will continue the best traditions and bring added distinction to the office of the Solicitor General.
Among its other virtues, the nomination of Solicitor General Elena Kagan to the Supreme Court is an opportunity to rescue the confirmation process from the “vapid and hollow charade” that it has become.

The words in quotation marks are those of Ms. Kagan herself, from an article she wrote for the law review of the University of Chicago when she was an assistant law professor there in 1995. The article was a clarion call for substantive questions from senators and similarly substantive answers from Supreme Court nominees. The court and its justices, Professor Kagan asserted, are simply too important for anything less to be acceptable.

The implications of her analysis are little short of revolutionary. Although the 15-year-old article focuses on the confirmation hearings for Justices Ruth Bader Ginsburg and Stephen G. Breyer—whose confirmation strategy Professor Kagan described as “alternating platitudinous statement and judicious silence” in response to questions by senators who then failed to push the nominees further—it is hardly outdated.

In the years since, we have heard descriptions of justices as umpires who simply call balls and strikes (John G. Roberts Jr.) or who decide cases by matching the facts to the law, “with the law always commanding the result in every case” (Sonia Sotomayor). Professor Kagan, by contrast, did not flinch from the truth of the matter.

The position of a justice is “both a seat of power and a public trust,” she wrote, adding that justices’ votes often “have little to do with technical legal ability and much to do with conceptions of value.” A confirmation hearing should uncover a nominee’s “vision of the court” in specifics, not generalities. “Privacy rights, free speech, race and gender discrimination”—everything should be placed on the table for analysis, Professor Kagan wrote.

I hope very much that the nominee means now what she wrote then. But that won’t matter if, as I fear, her White House handlers muzzle her on the theory that there is nothing to be gained by departing from the minimalist approach to hearings that has been working.

That would be an unfortunate calculation. Despite taking great care to reveal almost nothing, Sonia Sotomayor received 31 no votes. Only nine of the 40 Republican senators voted for her. So what was gained by the minimalist strategy? I would argue that her hearing was a net loss—not only for the public, which missed a chance to learn something about how judges actually think and behave, but for progressives in particular. The Sotomayor proceeding allowed conservatives to claim a sort of moral victory: see, they crowed, the only kind of nominee who can make the grade is one who intones our anti-activist mantra.

No one has asked me, but I have a question to which I would love to get Solicitor General Kagan’s answer. Last October, in her second appearance before the Supreme Court, she defended the federal government’s position on the validity of a
Congressionally authorized land swap in the Mojave Desert that left a Latin cross standing on land that had once been federal property, but was now privately owned. The question in the case, *Salazar v. Buono*, was whether this extremely odd real estate deal was a proper response to a decision that a private citizen had won in a lower court, which ruled that it was unconstitutional for the cross to be displayed on federal land.

Ms. Kagan argued that the plaintiff, Frank Buono, no longer had standing to pursue his challenge because he had testified earlier that as a Catholic, he had no general objection to crosses, just to crosses on government property. But the cross was now on private land; ergo, ran the government’s argument, no standing.

To be fair, Ms. Kagan did not invent this sophistic argument; she inherited it from the Bush administration. But she pursued it with enthusiasm. I thought it was preposterous, and so did the court, to claim that the man who had successfully brought the case had lost his right to dispute Congress’s end run around his lower court victory.

Only Justices Antonin Scalia and Clarence Thomas agreed with Ms. Kagan’s argument, and Justice Anthony Kennedy’s plurality opinion dispatched it in a few sentences. I would like to know what Solicitor General Kagan really thought of that argument. The answer matters because, although that case is over and done with, the question of whether to foreclose access to court for citizens seeking to vindicate their rights is very much alive and is almost certain to be a continuing pressure point within the Roberts court.

That’s only one question, and there are many others. We have waited a long time for a nominee willing to give answers.
Supreme Court confirmation hearings are usually designed to probe a nominee’s conception of the role of the justices. But this week’s questioning of Elena Kagan turned into a tutorial on Congressional responsibility.

Over and over, Ms. Kagan reminded the senators questioning her of their own duty to pass cogent, sensible—and constitutional—laws. The Supreme Court, she said, was not created to strike down foolish measures.

On Tuesday, for instance, Senator Tom Coburn, Republican of Oklahoma, asked what should happen if Congress enacted a law requiring Americans “to eat three vegetables and three fruits every day.”

“It sounds like a dumb law,” Ms. Kagan said. But she would not commit to striking it down. “I think that courts would be wrong to strike down laws that they think are senseless, just because they’re senseless,” she said.

Ms. Kagan repeatedly said she would show “great deference to Congress.” Perhaps surprisingly, that was not what many senators seemed to want to hear. They appeared to want the Supreme Court to save them from themselves.

Richard H. Pildes, a law professor at New York University, said Ms. Kagan’s attitude toward Congress amounted to tough love. “Elena is a hard-minded person,” he said. “She’s lucid and clear and demanding of herself and demanding of others.”

“The deference to Congress that she’s talking about,” Professor Pildes added, “brings with it a real sense of the responsibilities of Congress as well.”

Asked on Wednesday by Senator Orrin G. Hatch, Republican of Utah, why, in her role as solicitor general, she had made an aggressive argument in defending a federal statute outlawing the sale of dogfighting videos, Ms. Kagan said poor legislative craftsmanship had left her little choice.

“I hesitate to criticize Congress’s work,” she said, “but it was a statute that was not drafted with the kind of precision that made it easy to defend from a First Amendment challenge.”

Ms. Kagan aligned herself with Justice Oliver Wendell Holmes Jr., who held his nose in the early years of the last century while voting to uphold statutes he thought were foolish.

Justice Holmes, Ms. Kagan said, “hated a lot of the legislation that was being enacted during those years, but insisted that if the people wanted it, it was their right to go hang themselves.”

In his memorable dissent in Lochner v. New York, a 1905 decision that struck down a New York work-hours law, Justice Holmes wrote that the Supreme Court should work hard to stay out of the way where economic legislation is concerned.

“A constitution is not intended to embody a
particular economic theory," he wrote. "It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

That is essentially the answer Ms. Kagan gave, in a kind of confirmation jujitsu, to questions from senators of both parties eager to see their views made into law by the courts rather than Congress.

Senator Amy Klobuchar, Democrat of Minnesota, asked about opportunities for female lawyers. Ms. Kagan agreed that society had far to go. "But this isn’t the court’s role," she said. "This really is Congress’s role."

What about the disparity between sentences imposed for trafficking in crack and powder cocaine, one that tends to produce racially skewed punishment? asked Senator Richard J. Durbin, Democrat of Illinois.

"It is a policy issue, quintessentially," Ms. Kagan responded. "There’s nothing that the Supreme Court or that any court can do about it. It’s really one that Congress has to decide."

Like judges, members of Congress also swear to uphold the Constitution, Ms. Kagan said, and they should not look to the courts to save them from their folly.
Far from turning into a “vapid and hollow charade,” to use Elena Kagan’s now-famous condemnation of other Supreme Court confirmation hearings, her own have been impressively substantive. But the most surprising development in the Kagan hearings this week has been the performance of the Senators: Both Democrats and Republicans have articulated clear visions of the law—Democrats say judges should uphold progressive legislation like campaign finance and health care; Republicans say they should strike those regulations down—and have pressed Kagan in sophisticated ways.

My nominee for the best question comes from Senator Al Franken, who, although not a lawyer, has emerged as the leading progressive constitutionalist in the Senate. In his championing of net neutrality and opposition to the Comcast/NBC merger, Franken recognizes that private corporations, like Comcast, now have more power over who can speak than any government, and that the most important threats to free speech in the twenty-first century will come not from government but from the concentration of corporate power. “When the same company owns the programming and runs the pipes that bring us the programming, I think we have a problem,” Franken said to Kagan.

Quoting an opinion by Justice Hugo Black, which held that First Amendment values support vigorous antitrust enforcement because “freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not,” Franken worried that Comcast, “the nation’s largest cable operator and also the largest home Internet service provider” could “if it owned both the pipes and the programming,” have “the ultimate ability to keep others from publishing,” favoring its own programming or charging more for it. “To make matters worse,” Franken said, “if Comcast and NBC merge, I worry that AT&T and Verizon are going to decide that they have to buy ABC or CBS to compete,” resulting in “less independent programming, fewer voices, and a smaller marketplace of ideas. That’s a First Amendment problem. It’s also an antitrust problem.” That led to Franken’s question: “Given all of this, do you believe that the First Amendment could inform how the government looks at media antitrust cases?” Kagan, while unable to comment on the pending Comcast merger, acknowledged Franken’s point: “I guess you could be thinking about that as a kind of policy matter as to whether the authorities that are responsible for approving mergers and such ought to take into account so-called . . . First-Amendment values.” While the cable shows were focused on his doodles of Senator Sessions, Franken was making a serious point. And it reinforced the theme he struck throughout the hearings: that the pro-corporate decisions of the Roberts Court are harming American citizens in tangible ways.

First runner-up for questions about free speech: Senator Amy Klobuchar, who asked Kagan about a law review article in which she had criticized the rigorous standard for libel set out in New York Times v. Sullivan, suggesting that it allowed private figures to be defamed without an effective remedy. Had the confirmation process or comments from social media and bloggers changed her
views? After emphasizing that "I think people should be able to write anything they want about me, and I don't think that I should be able to sue them for libel," Kagan said: "Even as we understand the absolute necessity for a kind of New York Times versus Sullivan sort of rule and for protection of speakers from libel suits, defamation suits, even as we understand that, we should also appreciate that people who did nothing to ask for trouble, who didn't put themselves into the public sphere can be greatly harmed when something goes around the Internet and everybody believes something false about a person. That's a real harm. And the legal system should not pretend that it's not."
Dear Senators:

* * *

I address my comments especially to those who adhere to a generally conservative understanding of the role of the Supreme Court in interpreting the Constitution and the laws of the United States. Obviously, any nominee of this Administration will reflect the progressive political outlook of the President; one of the prerogatives of the President under our Constitution is nominating Justices who share his views. Much in Elena Kagan’s record demonstrates that outlook. But this must not be exaggerated. On a significant number of important and controversial matters, Elena Kagan has taken positions associated with the conservative side of the legal academy. This demonstrates an openness to a diversity of ideas, as well as a lack of partisanship, that bodes well for service on the Court. No one can foresee the future, but I would not be surprised to find that Elena Kagan, as a Justice, serves more as a bridge between the factions on the Court than as a reliably progressive ideological vote. In short, I think she will be more conservative than liberals hope, and less liberal than conservatives fear.

It is all too easy to speak of nominees in airy generalities, so let me be specific. I will comment on her work on freedom of speech, freedom of religion, and executive power, as well as her role as Dean of the Harvard Law School in attracting a more ideologically diverse faculty. I will also offer a comment on what I regard as the only serious blemish on her record: her participation in Harvard’s refusal to allow students who wished to interview for careers in the military the ability to use the ordinary facilities of career services.

Freedom of Speech

Freedom of speech was one of Professor Kagan’s two principal fields of scholarly work. Her writings on this subject have been thoughtful, insightful, and of high academic quality, and on many if not most points congruent with conservative civil libertarian thinking on these issues. I would call particular attention to her article entitled *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, The R.A.V. case was difficult and controversial, involving a hate speech prosecution based on an ugly cross-burning incident in St. Paul, Minnesota. There were three opinions. One, by Justice Antonin Scalia, applied the strong protections for freedom of speech that have been characteristic of conservative free speech jurisprudence over the past generation. It held that the local ordinance under which the defendant had been prosecuted was viewpoint discriminatory and hence unconstitutional. Another opinion, by Justice John Paul Stevens, described Justice Scalia’s position as “absolutist” and maintained that even “selective, subject-matter regulation on proscribable speech is constitutional.” In her article on the case, Professor Kagan wrote that “Justice Scalia seems to me to have the upper hand,” and that Justice Stevens’s position “cannot be right as a general matter.”
It bears mention that the principle of viewpoint neutrality has been central to free speech victories on the part of dissidents from leftwing orthodoxy on campus, including most conspicuously Rosenberger v. University of Virginia. It thus appears that conservative defenders of freedom of speech will have an additional ally on the Court. Notably, Professor Kagan wrote her R.A.V. article at a time when hate speech codes were supported by many left-leaning members of the legal academy. Thus, her article demonstrates not only that her constitutional principles on this matter lean more toward the conservative position, but that she has the courage and independence to take sides at odds with the tide of opinion among her ostensible political allies.

Some conservative free speech supporters have criticized Solicitor General Kagan’s defense of the Bipartisan Campaign Reform Act (BCRA) in the Citizens United case, and her decision to argue the case personally. Speaking as a former lawyer in the Solicitor General’s office, I regard this criticism as specious: it is the job of the Solicitor General to defend the constitutionality of statutes. Every Solicitor General defends statutes with which he or she does not agree. (Certainly that was true of the Solicitors General under whom I served, Rex E. Lee and Charles Fried.) More importantly, these critics fail to give proper weight to the nature of the arguments General Kagan made, and did not make, in the case. Although she defended BCRA on the basis of anti-corruption and stockholder-protection rationales, she conspicuously failed to put forward the most common, but troubling rationale for restricting corporate political speech: that to allow great aggregations of wealth to participate in campaign-related speech would distort the marketplace of ideas.

General Kagan’s decision not to defend the law on this basis was surprising, because the Supreme Court had previously embraced that rationale in Austin v. Michigan Chamber of Commerce. According to Justice Thurgood Marshall’s opinion in Austin, the ability of corporations to use “resources amassed in the economic marketplace” would give them “an unfair advantage in the political marketplace.” The government thus has a “compelling interest” in preventing “the corrosive and distorting effects of immense aggregation of wealth” on the democratic process. Because one of the questions posed in Citizens United was whether Austin should be overruled, and General Kagan was defending Austin, it would have been standard practice to present and defend all the rationales on which Austin rested.

We can be nearly certain that the reason General Kagan did not present the “anti-distortion” rationale is that she does not agree with it. In The Changing Faces of First Amendment Neutrality, she wrote that giving the government the power “to decide what ideas are overrepresented or underrepresented in the market” and would be “dangerous.” It would be dangerous because the playing field of speech and political advocacy is inherently filled with inequality, and if the government may choose which inequalities to “correct” by suppressing some speakers and not others, it would have a powerful instrument for suppression of speech, going far beyond the context of corporations.

General Kagan’s decision to omit the anti-distortion argument is all the more remarkable because this rationale has been embraced by the President who nominated her, as well as the Justice whom she has been nominated to replace. In his speech announcing the nomination, President Obama stated that he was nominating a Justice “who, like Justice Stevens, knows
that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.” That may be true of Justice Stevens, who embraced the anti-distortion argument in his dissent in *Citizens United*. But General Kagan declined to make any such argument. Whether Senators agree with Elena Kagan on this point or not, the fact that she was willing to adhere to her civil libertarian principles under these circumstances demonstrates remarkable independence.

* * *

**Executive Power**

On her return to academia after serving in the Clinton Administration, Professor Kagan turned primary attention to the question of executive power under administrative and constitutional law. Significantly, she defended the legitimacy and utility of direct presidential control over the regulatory agencies of the federal government. As she explains in an article entitled *Presidential Administration*, this degree of presidential control originated in modern times under President Reagan, but was extended under President Clinton. Although she distinguishes her position from strict notions of a constitutional unitary executive, in effect she reaches the same end through statutory analysis.

Professor Kagan’s writings on executive power are neither path-breaking nor particularly controversial, but their political context is noteworthy. She was writing during the early days of the presidency of President George W. Bush. It is one thing to defend executive power when the administration is political congenial, and quite another to do so when the presidency is held by a reviled member of the other political party. That Professor Kagan was willing to write in defense of broad presidential authority at the time she did, and in the teeth of an anti-executive turn by many of her political friends, demonstrates that her constitutional positions are driven by principle rather than political convenience. Whatever one’s views of the executive, that kind of integrity is a judicial virtue.

* * *

**Conclusion**

One of the most enduring questions about law and judging is whether it is anything more than politics. In her service in the executive branch and her time as Dean, Elena Kagan has skillfully navigated political waters. But she has also demonstrated another quality. Publicly and privately, in her scholarly work and in her arguments on behalf of the United States, Elena Kagan has demonstrated a fidelity to legal principle even when it means crossing her political and ideological allies. This is an admirable and essential quality in a judge. Barring unexpected developments during the confirmation hearings, I urge you to confirm Elena Kagan to be an Associate Justice of the Supreme Court.
Elena Kagan’s record shows her to be an inappropriate choice for the Supreme Court.

After studying Elena Kagan’s record, actively participating in her hearing, and listening to the views of folks in Utah and across the country, I do not believe that she meets the standards we should require of federal judges—especially Supreme Court justices.

The first important standard is experience. Ms. Kagan has never before served as a judge—and, in addition, has little legal experience of any kind. Over the Supreme Court’s long history, justices who were nominated without past judicial experience have had an average of 21 years of legal practice. Ms. Kagan has two. Her experience is instead academic and political.

Ms. Kagan’s lack of experience puts even greater emphasis on the second standard: an appropriate judicial philosophy. America’s founders gave us some principles that establish this standard. James Wilson, who signed the Declaration of Independence and was one of Pres. George Washington’s original Supreme Court appointees, said that in America, “the people are masters of the government.” To be masters of the government, the people must control the Constitution that created government. President Washington said in his farewell address that the very “basis of our political systems is the right of the people to make and alter their constitutions of government.” Controlling the Constitution means not only selecting its words but determining the meaning of those words. Thomas Jefferson warned that our written Constitution can help secure liberty only if it is not made a “blank paper by construction.”

The law that federal judges interpret and apply to decide cases is written law—the Constitution and statutes. The Constitution must not only say what the people said when they made it, but it must mean what the people meant. Judges who take control of the Constitution’s meaning take away the people’s control over their Constitution and destroy this essential ingredient for liberty.

Will the Constitution control Elena Kagan, or will she try to control the Constitution? Does she believe that judges may change the meaning of the Constitution, and of the law generally? Is there any evidence that her personal or political views drive her legal views?

Ms. Kagan told the Judiciary Committee that “I think you can look to my whole life for indications of what kind of a judge or justice I would be.” That review provides several important categories of evidence. First, she has written and spoken generally about the role judges play in our system of government. In her Oxford University master’s thesis, for example, Ms. Kagan wrote that “new times and circumstances demand a different interpretation of the Constitution” and that judges may “mold and steer the law in order to promote certain ethical values and achieve certain social ends.” Several years later, as a law professor, she wrote that “the judge’s own experience and values become the most important element in the decision” of most Supreme Court cases. “If that is too results oriented,” she wrote, “so be it.”
Ms. Kagan served as a law clerk to Supreme Court justice Thurgood Marshall. In a tribute she wrote after his death, she described as a “thing of glory” his belief that the role of the courts and the purpose of constitutional interpretation is to “safeguard the interests of people who had no other champion.” In 2006, while dean of Harvard Law School, Ms. Kagan introduced Israeli Supreme Court justice Aharon Barak as “the judge or justice in my lifetime whom I think best represents and has best advanced . . . the rule of law.” Justice Barak is widely credited as perhaps the most activist jurist in the world; for him, as Judge Richard Posner has described it, “the judiciary is a law unto itself.”

The second category of evidence comes from the actions she took and the decisions she made while serving in the Clinton administration and as dean of Harvard Law School. Ms. Kagan played a central role in developing and advancing the Clinton administration’s extreme position on abortion, including the barbaric practice of partial-birth abortion. In a 1996 legislative-strategy memo, she labeled a “disaster” a proposed statement by a key medical group that there exist “no circumstances” in which partial-birth abortion is the only option. She drafted, and persuaded the group to adopt, language with a much more positive political spin. At her hearing, she offered the Judiciary Committee the implausible claim that she was merely trying to ensure that the medical group accurately expressed its own medical opinion.

In a 1997 legislative-strategy memo after President Clinton vetoed the Partial Birth Abortion Ban Act, Ms. Kagan urged him to support substitutes offered by Democratic senators. This tactic was intended to siphon votes away from a veto override, and, because the substitutes would not pass, leave partial-birth abortion unlimited. She made this political recommendation, however, even though the Justice Department’s Office of Legal Counsel concluded that the substitutes were unconstitutional under Roe v. Wade. It appears that her personal or political views trumped her legal views.

At Harvard, Ms. Kagan defied the federal Solomon Amendment, which required that, at schools that receive federal funding, military recruiters must be given the same access to students that other employers have. In 2002, the Defense Department informed Harvard that its practice of letting military recruiters contact students through the Harvard Law School Veterans Association—which had no office, no budget, and no staff—rather than the school’s own Office of Career Services, did not comply with the law.

Ms. Kagan condemned the so-called “don’t ask, don’t tell” law, calling it a “moral injustice of the first order,” and joined a legal brief in a case challenging the constitutionality of the Solomon Amendment. Hours after the U.S. Court of Appeals for the Third Circuit enjoined the law, she reinstated the “separate but equal” policy and shut military recruiters out of the CSO. Harvard, however, is in the First Circuit, not the Third, which means that the Solomon Amendment was still in force. Ms. Kagan continued blocking equal access by military recruiters even after the Third Circuit stayed its own decision. Once again, her personal views drove her legal views.

Ms. Kagan’s hearing did nothing to temper the picture of judicial activism painted by her record. Despite the excessive media and political attention one can receive, a confirmation hearing is only a small part of the picture for any nominee, and Supreme Court hearings have become less and less meaningful, with nominees prepared and prepped to provide answers that are more
form than substance. Ms. Kagan, for example, referred to any previous Supreme Court decision as “settled law,” whether it was two days or two centuries old. Her pledge to give such “binding precedent . . . all the respect of binding precedent” told us nothing more. In effect, she said that a decision is a decision and a precedent is a precedent—not much to go on.

Ms. Kagan chose not to answer many questions by various senators about a range of issues. I spent 30 minutes asking her about freedom of speech, campaign-finance reform, and the Citizens United v. FEC case, which she argued before the Supreme Court. I asked for her own views, but she instead told me what Congress said, what she argued before the Court, and what the Court held. I already knew those things because I had read the statute, the transcript, and the opinion. She would not even admit that she had in fact written the 1996 memo about partial-birth abortion that not only bore her name but included her handwritten notes. After three attempts, all she would say is that it was in her handwriting; I suppose that left open the possibility that it had been forged.

A nominee, of course, may choose to use such code words and evasions. For Ms. Kagan, however, this choice stood in stark contrast to her previous strong critique of Supreme Court confirmation hearings. After serving on the Judiciary Committee staff during Justice Ruth Bader Ginsburg’s hearing, Ms. Kagan wrote in a 1995 law-journal article that Supreme Court confirmation hearings had become a “vapid and hollow charade” and taken on “an air of vacuity and farce.” The solution, she said, was for a nominee to discuss “the votes she would cast, the perspective she would add, and the direction in which she would move the institution.” Ms. Kagan refused to discuss any of these at her own hearing, prompting the Associated Press to ask the question on many Judiciary Committee members’ minds: “What happened to the Kagan standard?”

Liberty requires limits on government; it always has, and it always will. That includes limits on judges. Measured against that standard, Elena Kagan’s record shows that her primarily academic and political experience and her activist judicial philosophy make her inappropriate for serving on the Supreme Court. Her hearing offered nothing to neutralize the clear evidence of what kind of justice she will be.
Democratic and Republican senators alike lamented the increasingly sharp partisan divide over the Constitution and the courts Tuesday, and then divided mostly along party lines to approve Elena Kagan, President Obama’s nominee for the Supreme Court.

The lone maverick was Sen. Lindsey Graham (R-S.C.), who voted to confirm Kagan because, he said, she is smart, well-qualified and of good character.

“But yes, she’s liberal,” he said, and paused. “Sort of expected that, actually.”

Kagan won a 13-6 vote from the Senate Judiciary Committee, the next to last stop on her way to a lifetime seat on the Supreme Court. The Senate is expected to give her final approval in early August.

If Kagan is confirmed, the nine-member high court will have four Democratic appointees for the first time since 1971. And for the first time ever, three of the justices will be women, and none will be a Protestant.

But Graham drew the studied attention of the committee members with his warning that partisan politics is playing too large a role when considering judges.

“Something’s changing when it comes to the ‘advice and consent’ clause,” he said, referring to the part of the Constitution that gives the Senate the power to approve the president’s court nominees. “Things are changing here, and they’re unnerving to me.”

In the past, a president’s well-qualified nominees usually won easy confirmation from the Senate. Justice John Paul Stevens, whom Kagan would replace, won unanimous approval from the Senate in 1975, even though Democrats had a large majority and he was a Republican nominee.

Justices Antonin Scalia and Anthony M. Kennedy also won unanimous votes in the late 1980s. In the last decade, however, the Senate has split along party lines over Supreme Court candidates. Kagan is expected to win only a handful of Republican votes.

The president shares part of the blame for this pattern, Graham said. As an Illinois senator planning to run for president, Obama praised John G. Roberts Jr., President George W. Bush’s nominee to be chief justice, as exceptionally well-qualified. He nonetheless voted against his nomination.

Obama also cast a “no” vote against Samuel A. Alito Jr., who was confirmed in 2006 with support from only four Democrats.

“Sen. Obama was part of the problem, not the solution,” Graham said.

For Sen. Arlen Specter (D-Pa.), it was probably his last Supreme Court hearing after 30 years in the Senate. He too fretted over the partisan division. “I am sorry, but not surprised, to see the partisan split on this nomination, because that reflects the ideological battleground that is going on the
Supreme Court today,” he said.

The court, like Congress, regularly divides along conservative-liberal lines. That split may appear even more political in the year ahead, with five Republican appointees who cast conservative votes and four Democratic appointees who will likely vote as a liberal bloc.

“This reflects a hardening of the partisan divide on constitutional issues,” said Princeton University professor Christopher Eisgruber. “To take one example, tell me how a judge votes on abortion, and I can probably tell you how he votes on gay rights, affirmative action, campaign finance, gun control and so on. There is a clear, coherent ideological view across the issues. It wasn’t always like that.”

In the 1970s and early 1980s, several justices, including Potter Stewart, Byron White, Lewis Powell and John Paul Stevens, could not be easily labeled as liberal or conservative. Only Kennedy plays a similar role today, voting with the conservatives on some issues and the liberals on others.
Elena Kagan was sworn in on Saturday as the 112th person, and fourth woman, to serve on the Supreme Court, continuing a generational and demographic transformation of the nation’s highest bench. In keeping with tradition, Ms. Kagan first took the constitutional oath given to a wide array of officials and then the judicial oath administered to those wearing the robe. Joined by family and friends in the Supreme Court building, she swore to “administer justice without respect to persons, and do equal right to the poor and to the rich.”

The low-key formal ceremony came two days after she was confirmed by the Senate and a day after President Obama marked her ascension with a jubilant televised celebration in the East Room of the White House. She was Mr. Obama’s second successful nominee to the court, and her approval by the Senate was taken as a jolt of validation for a White House battered by political and economic troubles.

Succeeding Justice John Paul Stevens, the court’s retiring liberal leader, Justice Kagan, 50, presumably will not drastically change the philosophical balance on the divided court. But if she were to serve until she was 90, as Justice Stevens has, she would have four decades to shape the nation’s legal architecture, long after the man who appointed her left the White House. Even a shorter tenure would give her time to leave her mark.

Arguably, Justice Kagan made a mark from the moment she took the oaths on Saturday. She is the third woman on the current court, joining Justices Ruth Bader Ginsburg and Sonia Sotomayor. She is also the fifth justice born after World War II, making that group a majority, and she brings down the average age on the court to 64, from nearly 69. And she is the first person since William H. Rehnquist, 38 years ago, to join the court without experience as a judge.

If her installation added diversity in some ways, though, it reinforced the court’s lack of it in other areas. Her addition means the court now includes neither Protestants nor anyone without an Ivy League background. Justice Kagan joins two other Jewish justices and six Catholics. She is the sixth justice to have studied at Harvard Law School (although Justice Ginsburg later transferred to and graduated from Columbia Law School); the other three graduated from Yale Law School. And she is the fourth justice to have grown up in New York City.

Mr. Obama did not attend Saturday’s ceremony, but at Friday’s event he said a third woman on the court would make it “a little more inclusive, a little more representative.” He added, “It is yet another example of how our union has become more, not less, perfect over time—more open, more fair, more free.”

Afterward, Justice Kagan made no mention of that but vowed to uphold the rule of law, saying she would “work my hardest and try my best to fulfill these commitments and serve this country I love as well as I am able.”
Justice Kagan seemed to have had her sights trained on the Supreme Court for years. She served as a lawyer and domestic policy aide in the Clinton White House, was dean of Harvard Law School and, last year, was appointed by Mr. Obama as solicitor general, the government's lawyer before the Supreme Court.

She was confirmed Thursday on a 63-to-37 Senate vote, with most Republicans opposing her, citing her lack of judicial experience and liberal views on issues like abortion, guns and gay rights.

Republicans criticized her for barring military recruiters from using a Harvard facility because of the rule banning gays and lesbians from serving openly. They also said she “would ally herself not with the constitutional liberties of all Americans, but with the big government agenda of the president who nominated her,” as Senator Jeff Sessions of Alabama, the ranking Republican on the Judiciary Committee, put it.

Saturday's ceremony consisted of two parts. First, in the justices' conference room with just a handful of Ms. Kagan's relatives present, Chief Justice John G. Roberts Jr. administered the constitutional oath for federal employees swearing to "support and defend the Constitution." Then they moved into the larger West Conference Room, where the chief justice administered the judicial oath.
This summer, as Elena Kagan quietly moved toward confirmation to the Supreme Court, three major legal disputes took shape that could define her early years.

The justices soon will be called upon to decide whether Arizona and other states can enforce the immigration laws, whether same-sex couples have a right to marry and whether Americans can be required to buy health insurance. Kagan's record strongly suggests she will vote in favor of federal regulation of immigration and health insurance and vote to oppose denial of marriage rights to gays and lesbians.

What is less clear is whether she will be voting with a center-left majority that includes Justice Anthony Kennedy, or as liberal dissenter on a court whose five Republican appointees outvote the four Democratic appointees.

Kagan, at age 50, is the fourth new justice in five years. And for the first time, the high court has three women. But the ideological divide is unlikely to change much.


In the major cases that divide the court, however, the outcome almost always depends on Kennedy, 74.

At this time last year, Kagan was preparing to defend the 63-year-old law that barred businesses from spending corporate money to elect or defeat candidates for office. It was her first argument before the court, and she expected to lose. Kagan had been a student of the court's work for two decades before becoming U.S. solicitor general, and she knew Kennedy believed "corporate political speech" was protected by the First Amendment.

Her instincts proved correct. In January she was on the losing end of the 5-4 decision in the Citizens United case, with Kennedy speaking for the conservatives and striking down the election spending limits for corporations and unions.

She no doubt hopes to have more influence now that she has joined the court. Moreover, Kennedy has not tipped his hand in the same way on the upcoming disputes on immigration, health care and same-sex marriage.

She began her wooing of Kennedy four years ago. As the dean of the Harvard Law School, she invited him to be honored as a graduate of the class of 1961.

She noted that Harvard University had published a recent ranking of its 100 most influential alumni, which put Kennedy in fourth place, higher than any other members of the Supreme Court.

"But judging is about more than power and influence. It's also, indeed most
fundamentally, about independence and integrity,” she said. “In fact, what Justice Kennedy has done, time and time again, and each and every case, is to think for himself.”

That is the source for “his obviously huge influence on the current court,” she said.

The immigration issue presents a dispute between the state, which wants stricter enforcement, and federal authority. Arizona says it will appeal to the Supreme Court a ruling striking down provisions of its law requiring police to check the immigration status of those who are arrested.

Before that case arrives, however, the high court will decide another Arizona immigration case that involves sanctions against employers who hire illegal immigrants. Kagan worked as an executive branch lawyer in two Democratic administrations and supports strong executive power, so she is likely to vote for strong federal authority over immigration. But her support for executive authority may tilt the court to the right on issues over the president’s power to pursue terrorism suspects as enemy combatants. Stevens was the leading voice for limits on presidential power.

Meanwhile, a legal threat to President Barack Obama’s health care overhaul law grew last week. A federal judge in Virginia hinted that he is likely to strike down the mandate to have health insurance as being beyond Congress’s power. “Never before has the commerce clause . . . been extended this far,” said U.S. District Judge Henry Hudson.

In the past, Kennedy voted to strike down federal laws on similar grounds, but he also joined opinions that said Congress can regulate any “economic activity.”

Last week’s ruling by Judge Vaughn Walker striking down California’s ban on same-sex marriage will almost certainly send that case to the Supreme Court. At Harvard, Kagan spoke out strongly against discrimination against gays. She called the U.S. military’s ban on open gays and lesbians a “profound wrong and a moral injustice of the first order.”

Kennedy also has written strong gay-rights opinions. One in 2003 struck down a Texas law that treated gays as criminals, saying that “moral disapproval” does not justify treating gays as “unequal in the eyes of the law.” In that case, he included a caveat.

The court was not saying the state “must give formal recognition to any relationship” between gays, he said then. He has been wary of the court moving ahead of public opinion on a controversial issue.

But thanks to Walker’s decision, the question of a state’s duty to give “formal recognition” to same-sex relationships will soon be before Kennedy and the court.