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Mathew D. Staver, Esq.  
Founder and Chairman

Anita L. Staver, Esq.  
President



Mathew D. Staver  
Founder and Chairman

Anita L. Staver  
President

A NATIONWIDE PUBLIC INTEREST RELIGIOUS CIVIL LIBERTIES LAW FIRM

1055 Maitland Center Cmns.  
Second Floor  
Maitland, Florida 32751  
Tel: 800•671•1776  
Fax: 407•875•0770  
www.LC.org

1015 Fifteenth St. N.W.  
Suite 1100  
Washington, DC 20005  
Telephone: 202•289•1776  
Facsimile: 202•216•9656

100 Mountain View Road  
Suite 2775  
Lynchburg, Virginia 24502  
Tel: 434•592•7000  
Fax: 434•592•7700  
liberty@LC.org

## ***OBAMA NOMINATES ELENA KAGAN TO RESHAPE THE SUPREME COURT INTO HIS POLITICAL IMAGE***

### ***Introduction***

President Barack Obama has nominated an individual to the United States Supreme Court who shares his belief that the Constitution is a living document, supports abortion, and who will manipulate the Constitution in order to reshape America. Elena Kagan shares Obama's liberal judicial and political philosophies and has been a his longtime political supporter.

Appointments such as this, where the President's appointment is based on favoritism and friendship rather than the experience and qualifications of the nominee, are precisely why we called for the withdrawal of Harriet Miers when she was nominated by George W. Bush. It is also why the Founding Fathers placed a check on the President's power of appointment, requiring the advice and consent of the Senate.

This advice and consent process is incredibly important and as Kagan has stated, Supreme Court nominees should endure tough hearings, where nominees are asked questions regarding their positions on issues, ideology, and judicial philosophy. Kagan should specifically be asked about her previous writings and statements, including those in which she lauds socialism, is willing to restrict free speech, is hostile towards the military and religion, supports abortion, and particularly where she states that the Constitution is "defective," contains "outdated notions," and attributes "our modern Constitution" to liberal Justice Thurgood Marshall, de-emphasizing the role of the Founding Fathers who drafted the document.

Senators should also make Elena Kagan reveal her judicial philosophy that elevates international and transnational law over American law.

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The role of senators in the confirmation process and the views and the judicial philosophies of Elena Kagan and President Barack Obama are further developed below.

### **SENATE'S OBLIGATION IN VETTING NOMINEES:**

In writing about the confirmation process, Alexander Hamilton stated: "To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view of popularity.... He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."<sup>1</sup> The Founding Fathers did not want Presidents appointing people because they were his friends or because they shared his ideology, they wanted the President to appoint individuals who were qualified. With Kagan, Obama has nominated an individual he thinks will carry his agenda to the judiciary.

Kagan, herself, has recognized the importance of the advice and consent process, having stated that "a nominee can say a great, great deal before making a statement that, under this standard, nears the improper. A nominee, as I have indicated before, usually can comment on judicial methodology, on prior caselaw, on hypothetical cases, on general issues like affirmative action or abortion. To make this more concrete, a nominee can do ... well, what Robert Bork did."<sup>2</sup>

### ***Obama's Requirements for Judicial Nominees:***

Obama has provided some understanding of what he was looking for, and Americans should recognize that President Obama's nomination of Elena Kagan indicates that she meets the following criteria:

- "a keen understanding of how the law affects the daily lives of the American people," an elaboration of the "empathy" standard he sought in Justice Sotomayor;
- "somebody who is going to be interpreting our Constitution in a way that takes into account individual rights, and that includes women's rights," in other words, someone who is pro-abortion; and
- "part of what our core Constitution – constitutional values promote is the notion that individuals are protected in their privacy and their bodily integrity, and women are not exempt from that," in other words, someone who will expand the umbrella of the "penumbras" of the Constitution, reading into the Constitution what the Founding Fathers did not intend it to say, when most Americans want it to be applied how it is written.

1 Alexander Hamilton, Federalist No. 76: The Appointing Power of the Executive.

2 Elena Kagan, *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919, 940 (1995).

Additionally, Kagan shares his judicial philosophy and ideologies, which should concern Americans, considering on January 18, 2001, he said, “The Supreme Court [has] never ventured into the issues of redistribution of wealth and served more basic issues of political and economic justice in this society... It didn’t break free from the essential constraints that were placed by the Founding Fathers in the Constitution. ... I think one of the tragedies of the civil rights movement was because the civil rights movement became so court-focused ... there was a tendency to lose track of ... the actual coalitions of power through which you bring about redistributive change... [W]e still suffer from that.”<sup>3</sup>

### ***Kagan’s Experience (or lack thereof):***

The resumé of this Upper West Side Ivy Leaguer contains little experience related to legal practice. She has only two years of private practice experience and only in her role as Solicitor General has she gained any experience in court, only arguing six appeals.<sup>4</sup> She has spent most of her career in government, under the Clinton and Obama Administrations, and as Dean of Harvard Law School, where she reshaped the curriculum to de-emphasize American law and instead required classes on international law while encouraging professors and students to approach American law from a transnational perspective.

Not only does Elena Kagan lack the experience (she has less than Harriet Miers did when she was nominated and Republicans demanded a more experienced nominee from President Bush), but Kagan’s writings evidence the fact that she lacks the ability to interpret the law without invoking her own personal experiences and prejudices. In fact, she was not able to do so when she was acting as Solicitor General. Though her duty as Solicitor General was to defend the laws of the United States, and though in her confirmation hearings for the position, she swore she would do so, when the time came to act, she refused. She refused to intervene in cases regarding “Don’t Ask, Don’t Tell,” the Defense of Marriage Act, gun bans, and life sentences for juveniles. These are Kagan’s words, from a thesis she wrote in pursuit of her Masters degree, “... judges will have opinions, prejudices, values. Perhaps most important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid. The law, after all, is a human instrument – an instrument designed to meet men’s needs.”<sup>5</sup> Her inaction as Solicitor General speaks to her “opinions,” “prejudices,” and “values” regarding particular issues and how she may adjudicate in accordance with her ideology.

### ***Kagan’s Position on Judicial Activism:***

Kagan’s self-proclaimed “judicial hero” is Aharon Barak, who said that judges should “adapt the law to life’s changing needs,” and who said a judge “may give a statute a new meaning, a dynamic meaning,

3 Ken Blackwell and Ken Klukowski, *The Blueprint: Obama’s Plan to Subvert the Constitution and Build an Imperial Presidency*, 47 (2010).

4 Josh Gerstein, *Elena Kagan’s Scant Writings Spark Concern*, Politico, May 10, 2010, <http://www.politico.com/news/stories/0510/37041.html>

5 Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, p. 120 (April 20, 1983) (unpublished M.P.P. thesis, Oxford University) ([http://www.fed-soc.org/docLib/20100518\\_OxfordThesis.pdf](http://www.fed-soc.org/docLib/20100518_OxfordThesis.pdf)).



that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statue remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.”<sup>6</sup>

In writing a law review praising liberal Justice Thurgood Marshall, for whom she clerked, Kagan said this: “He declared that the Constitution, as originally drafted and conceived, was ‘defective’; only over the course of 200 years had the nation ‘attain[ed] the system of constitutional government, and its respect for ... individual freedoms and human rights, we hold as fundamental today.’ The Constitution today, the Justice continued, contains a great deal to be proud of. ‘But the credit does not belong to the Framers. It belongs to those who refused to acquiesce in *outdated notions* of liberty, justice, and equality, and who strived to better them.’ The credit, in other words, belongs to people like Justice Marshall. As the many thousands who waited on the Supreme Court steps well knew, *our modern Constitution is his*.”<sup>7</sup>

Kagan argued the Supreme Court case, *Citizens United v. Federal Election Commission*, in an attempt to keep a corporation from funding *Hillary: The Movie*, a movie that expressed opinions regarding whether Hillary Clinton would make a good President.<sup>8</sup> During her oral argument, this short interchange between Chief Justice Roberts, Kagan, and Justice Kennedy took place: Roberts said, “... you are asking us to uphold *Austin* on the basis of two arguments, two principles, two compelling interests we have never accepted in the expenditure context.” To which Kagan responded, “... fair enough.” And Justice Kennedy followed with, “And to undercut *Buckley* in so doing?”<sup>9</sup> This exchange shows that Kagan is willing to confound and confuse precedent in order to reach the conclusion she desires, no matter the consequence. This can only lead Americans to believe that as a Supreme Court Justice, she would also confound and confuse the law in order to further her positions and ideologies from the bench.

In *Citizens United*, Kagan not only asked the Court to create law based on unrelated precedent, but she also stated that the government had the right to ban books and papers, the very speech that the First Amendment was adopted to protect.<sup>10</sup>

When Kagan worked for the Clinton Administration, she effectively recommended that President Clinton take action that she believed to be unconstitutional in order to provide him with political cover.<sup>11</sup> This raises serious questions about her ethics.

### ***Kagan's Position on Foreign Law:***

Four years after assuming the position of Dean of Harvard Law School, Kagan completely changed the law school's curriculum, putting a greater emphasis on international and comparative law, the purpose

6 Solicitor General Elena Kagan's *Judicial Hero*, Americans United for Life, May 12, 2010, <http://catholicexchange.com/2010/05/12/130230/>

7 Elena Kagan, *For Justice Marshall*, 71 Tex. L. Rev. 1125, 1125 (1993) (emphasis added).

8 *Citizens United v. Federal Election Commission*, 558 U.S. \_\_\_ (2010).

9 See [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205%5BReargued%5D.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf), page 64.

10 See [http://mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=b4e894b0-b6cc-4f96-8cde-db6156c8c9ae&ContentType\\_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group\\_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f](http://mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=b4e894b0-b6cc-4f96-8cde-db6156c8c9ae&ContentType_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f).

11 See [http://news.yahoo.com/s/ynews/20100512/ts\\_ynews/ynews\\_ts2028\\_3](http://news.yahoo.com/s/ynews/20100512/ts_ynews/ynews_ts2028_3)

of which was to embrace what Harvard called the “transnational nature” of law.<sup>12</sup> While making an international law course a requirement for first-year students, she deemed constitutional law an elective course, de-emphasizing the United States Constitution and encouraging students to view American law through an international lens.

Kagan has said, “at least some members of the Court find foreign law relevant in at least some contexts. . . . A number of the Justices have considered foreign law in the Eighth Amendment context, where the Court’s inquiry often focuses on “evolving standards of decency” and then on the level of consensus favoring or disfavoring certain practices.”<sup>13</sup> Though this does not provide specific insight into when and how Kagan would incorporate foreign law, she has accepted that in certain circumstances, on certain issues, it may be permissible and based on the curriculum change at Harvard, it is logical to conclude that Kagan would often incorporate foreign law into her decisions.

While Kagan banned military recruiters from Harvard Law’s campus, she welcomed Saudi recruiters who sought lawyers for work on Shariah-Complaint Finance.<sup>14</sup>

Kagan indicated an affinity for the socialist governments of other countries when she wrote, “Americans are more likely to speak of a golden past than of a golden future, of capitalism’s glories than of socialism’s greatness. Conformity overrides dissent; the desire to conserve has overwhelmed the urge to alter.”<sup>15</sup>

### ***Kagan’s Position on Religious Liberties:***

In a law review article, Kagan advocated for regulation of “hate speech” by first regulating conduct.<sup>16</sup>

Showing her hostility toward religion, or at least faith-based initiatives, Kagan stated, “the government is of course right that religious organizations are different and that these differences are sometimes relevant for the purposes of government funding. The government, for example, may give educational subsidies to religious universities, but not to parochial schools. But when the government funding is to be used for projects so close to the central concerns of religion, all religious organizations should be off limits.” She later, when it became convenient for her to do so, rescinded that position stating, “I think it incorrect (or, as I more colorfully said at the hearing, ‘the dumbest thing I ever heard’) essentially to presume that a religious organization will use a grant of this kind in an impermissible manner.”<sup>17</sup> Is it not odd that Obama has nominated someone who actually said the dumbest thing she had ever heard? The Supreme Court of the United States requires intelligent minds, not those who say “dumb thing[s].”

12 See [http://www.law.harvard.edu/news/bulletin/2008/winter/feature\\_3.php](http://www.law.harvard.edu/news/bulletin/2008/winter/feature_3.php)

13 See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>, page 4.

14 Frank J. Gaffney, Jr., *Kagan: Shill for Shariah?*, Big Government, May 19, 2010.

15 Mike Allen and Josh Gerstein, *White House to Release Kagan Theses*, Politico, May 17, 2010, <http://www.politico.com/news/stories/0510/37343.html#ixzz0oUA32ctP>

16 Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. Chi. L. Rev. 873, 902 (1993).

17 See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>, pages 26-27.

## ***Kagan's Position on Homosexuality and the Family:***

As Dean of Harvard Law School, Kagan initiated a ban of military recruiters from the campus because of the law that Congress enacted which bans those who engage in homosexual acts from serving in the military. The law that Kagan objected to was unanimously ruled constitutional in an 8-0 Supreme Court decision. In fact, she called the law a terrible and profound wrong.<sup>18</sup> It is certainly evident, based on her ban of military recruiters, that she is not what most Americans would call a patriot, and because of her lack of judicial experience, it is difficult to ascertain how her hostility towards groups like the military, that do not practice in accordance with her ideology, will translate into judicial opinions.

Kagan was a participant in the "HGLC 25th Anniversary Weekend," at which she moderated a panel regarding LGBT legal developments and trends, a panel on which lesbian activist, Chai Feldblum, served.<sup>19</sup>

## ***Kagan's Position on the Sanctity of Life:***

In an article she wrote, Kagan lamented the victories of pro-life Congressmen stating, "[e]ven after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents of Senators Church, McGovern, Bayh and Culver, these avengers of innocent life and the B-1 Bomber...",<sup>20</sup> which indicates her disdain for supporters of innocent life.

Kagan contributed financially to the pro-abortion group, National Organization for Women and Families, which has strong ties to Emily's List and NARAL.<sup>21</sup>

She criticized a 1991 U.S. Supreme Court decision that prohibited the use of Title X funds to pay for abortion referrals.<sup>22</sup> In other words, she believes that abortions should be taxpayer funded.

Kagan worked for some of the nations most notorious pro-abortion characters, including:<sup>23</sup>

- Judge Abner Mikva, who, during an interview, stated: "I think judges tend to be too separate from the political process and the body politic. I support the result of *Roe v. Wade*."
- Supreme Court Justice Thurgood Marshall, who said, "The right of every woman to choose whether to bear a child is, as *Roe v. Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman..."

18 See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>, page 9.

19 See <http://hglc.org/anniversary/schedule.html>.

20 Elena Kagan, *Nov. 10, 1980: Fear and Loathing in Brooklyn*, *The Princetonian*, Nov. 10, 1980, <http://www.dailyprincetonian.com/2010/05/03/26082/>

21 *Elena Kagan Donated to Pro-Abortion Women's Groups with Ties to Emily's List*, *Americans United for Life*, May 13, 2010, <http://www.lifenews.com/nat6332.html>

22 Elena 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.

23 See <http://www.aul.org/2010/05/auls-kagan-file-the-pro-abortion-politicians-memo/>

- Michael Dukakis, who prior to *Roe v. Wade*, introduced a bill in the Massachusetts House to repeal that state's pro-life legislation.
- Vice President Joe Biden, who believes the Constitution offers an "inherent right to privacy" and "strongly supports *Roe v. Wade*."
- President Bill Clinton, who vetoed the Partial Birth Abortion Ban passed by Congress not once, but twice; reversed the Mexico City Policy, allowing federal funding to go to groups that perform or promote abortion; and supported the Freedom of Choice Act (codifying *Roe* and *Doe* into federal statutory law).
- President Obama, who on the 35th Anniversary of *Roe v. Wade* during his presidential campaign, said: "With one more vacancy on the Supreme Court, we could be looking at a majority hostile to a women's fundamental right to choose for the first time since *Roe v. Wade*. The next president may be asked to nominate *that* Supreme Court Justice. *That* is what is at stake in this election."

## ***CONCLUSION***

Elena Kagan is a dangerously liberal activist who, if confirmed, could potentially spend decades on the bench of the highest court in the land, legislating rather than adjudicating and ultimately changing America for the worst.