

The Nomination and Confirmation of Justice Kagan

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Introduction

On Friday morning, 9 April 2010, Justice Stevens announced he would retire at the end of the Court's current term, which ends in June 2010. I immediately began collecting material for this essay. I made daily visits to *The Washington Post* website and various websites with Associated Press stories, frequent searches of Google News, plus occasional searches of legal blogs and *The New York Times*. On 9 May, SCOTUSblog began posting links to news articles about Kagan's nomination, and I reviewed those links several times a week. Sometime around 20 May, The Federalist Society began posting links to news articles about Kagan's nomination, and I reviewed those links at least several times a week.

After I chronicled the nomination and confirmation of Justices Alito¹ and Sotomayor,² I was thoroughly disenchanted with the process for selecting and confirming Justices to the U.S. Supreme Court, because merit was a distant consideration, and because politics dominated the process from beginning to end. For my positive suggestions on how to select a justice for the U.S. Supreme Court, see my earlier essay at <http://www.rbs0.com/sctjustices.pdf>.

My recent experience is that few people care about my detailed legal analysis of the confirmation of a Justice to the U.S. Supreme Court. For example, from the initial posting on 3 May 2009 to 9 April 2010, my two essays on the nomination and confirmation of Justice Sotomayor had a total of 6392 requests. This is a pathetically small response for approximately 290 hours of my unpaid time that produced a total of 280 pages of quotations, discussion, and analysis. Accordingly, my goal in this essay on the nomination of Justice Kagan is only to chronicle major events and to suggest reasons for decisions, as a resource for scholars in the future.

There is a stale joke that a man in a bar says "The problem with the world is ignorance and apathy." And the man sitting next to him says "I don't know and I don't care." <smile> Because citizens of the USA are ignorant of constitutional law and apathetic about nomination of judges, it is not surprising that politicians erode freedom and liberty for individuals, and increase the power of the government.

It is interesting to note that conservatives in the 1960s (e.g., Barry Goldwater, Nelson Rockefeller, Jacob Javits, George Romney, etc.) advocated small government, low taxes, and maximizing individual freedom. Supporting a woman's right to an abortion could be seen as a

¹ Standler, History of the Nomination of Samuel Alito, <http://www.rbs0.com/alito.pdf> (Feb 2006).

² Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> (Aug 2009) and The Confirmation of Justice Sotomayor, <http://www.rbs0.com/sotomayor2.pdf> (Aug 2009).

conservative position, in that the government should not be intruding on personal decisions. In the late 1970s, evangelical Christians hijacked the Republican party, and since then the Republicans have been anti-abortion, opposed to same-gender marriage, and even advocate government grants to religious organizations (so-called “faith-based groups”). Now, privacy and civil liberties advocates are nearly all liberals. Personally, I consider myself a traditional conservative, but because I want to expand privacy rights and because I want to expand civil liberties of individual people (and reduce the power of government), ironically I advocate appointing more liberal justices to the U.S. Supreme Court.

Potential Nominees

On 23 Feb 2010, Tom Goldstein, founder of SCOTUS blog, predicted:

Unfortunately for progressives who want the Administration to invest its political capital in a nomination, this summer is likely to be a profoundly difficult time in political terms. It is hard to overstate the Administration’s view of the significance of the loss of the sixtieth Democratic Senate seat. The point isn’t actually that there is a realistic chance that a Supreme Court nominee would be filibustered: there are several liberal candidates whom conservative Democrats and the Republican Senators from Maine might or might not ultimately support, but they would not filibuster. Supreme Court nominees require just fifty votes for confirmation, and with a committed effort, the Administration could get a relatively wide range of candidates through.

Instead, the effect of the vote is to reduce the Administration’s political capital and maneuvering room at a time when both are in short supply. The White House specifically and the Democratic Party more generally feel an urgent need to recapture some momentum to put their domestic agenda on track. The Administration was entirely invested – and “entirely” is not an overstatement – in a sixty-vote health care strategy, which failed the minute Scott Brown won in Massachusetts. Republicans know this, and they will do whatever is reasonably necessary to prevent Democrats from regaining their footing in the run up to the 2010 elections (as the Democrats would have done to them). The White House knows that Republicans know (etc.) and it will invest whatever political capital it has in getting centrist undecided Senators to support its domestic agenda – health care, jobs, and the like – rather than leaning on them to support a liberal Supreme Court nominee.

Look at it this way. Which of these three options is going to get President Obama re-elected:

- (a) 500,000 new jobs,
- (b) expanding health care for 10 million additional Americans, or
- (c) Seventh Circuit Judge Diane Wood?

No one — not even the most devoted members of the American Constitution Society — believes the answer is “c”.

....

As I suggested above, on some level, this is all about the decision whether to nominate Seventh Circuit Judge Diane Wood. If the President’s priority were to appoint a brilliant, moderately liberal jurist in whose views he has confidence (because she has a track record), he would appoint Judge Wood. No judge on the left in the country is so uniformly respected for her intellect and thoughtfulness. She is amazingly articulate, and at a hearing would be no less

impressive than was Chief Justice Roberts. She will be the near-uniform choice of the groups on the left – at least those who have given up on the dream of Pam Karlan.

....

In a world without ten percent unemployment and in which the White House's hope of health care reform was not hanging by (at best) a thread — i.e., a world in which the Obama Administration would be more willing to embrace the fight over the Supreme Court in the way the previous administration did – I think we would soon be talking about Justice Diane Wood. But that is not the world in which we live.

To the extent there is a tie-breaker with respect to Judge Wood in particular, it is her age. In actuarial and historical terms, she's far from old. But in an era in which Presidents seemingly put teenagers on courts of appeals to position them for the Court, fifty is the new sixty.

It is worth pausing here to consider the fantastic, sweeping success of conservatives in dramatically shifting the debate over Supreme Court nominees. Judge Wood represents nowhere near the far left wing of potential Democratic candidates, but her nomination and confirmation would require a significant investment of the Administration's political capital.

....

If not Judge Wood, then who? [9] Elena Kagan Young! Female! Has an exceptional ability to sound extremely articulate and thoughtful without saying anything that could cause offense. No material track record on anything.

....

At the same time, [Solicitor] General Kagan is extraordinarily – almost artistically – careful. I don't know anyone who has had a conversation with her in which she expressed a personal conviction on a question of constitutional law in the past decade. Now, there are obviously an awful lot of people whom I do not know. But I have never talked to anyone who talked to anyone who had a conversation like that.

....

So, here is how I expect the next few months to play out. In the spring, Justice Stevens will announce his retirement. In May or June, the President will nominate Elena Kagan. Explaining that her paper record is a thimble-full of Sonia Sotomayor's, Senator Leahy will schedule hearings and Senator Reid will schedule a floor vote before the summer recess. The only theme that will give opponents any success is that she fails to express her views on anything. She will then be confirmed by a vote of 61 to 39. Ok, that last prediction about the exact vote could be off by a bit, but I feel pretty confident about everything else.

Tom Goldstein, "On October 4, 2010, Elena Kagan Will Ask Her First Question As A Supreme Court Justice And Justice Ginsburg will look across the bench at her new colleague and smile,"

<http://www.scotusblog.com/2010/02/on-october-4-2010-elena-kagan-will-ask-her-first-question-as-a-supreme-court-justice/>
(23 Feb 2010).

Journalists reported that President Obama will begin the nomination process with the list of candidates developed in 2009, when Justice Souter retired. In my remarks on the Sotomayor nomination, I noted that list was specifically designed to include women, and to exclude men.³ Further, law professors and federal judges with a deep knowledge of constitutional law were conspicuously absent from the list, while many politicians were included on the list.⁴

The Washington Post reported on 9 April, hours after Justice Stevens announced his retirement:

Aides and Democrats close to the process named three people as likely front-runners for the job: Solicitor General Elena Kagan, whom Obama appointed as the first woman to hold the post, and two appellate court judges, Diane P. Wood of Chicago and Merrick B. Garland of Washington.

Kagan and Wood were interviewed by Obama last spring before he nominated Sonia Sotomayor to the court.

....

Besides Kagan and Wood, the only runner-up Obama interviewed last time was Department of Homeland Security Secretary Janet Napolitano. Garland was on a list of nine potential nominees considered by the White House, but Obama was determined to make a woman his first pick for the court. Sotomayor made history as the court's first Latina.

Because the choice will not affect the court's ideological balance, White House officials say — perhaps, wishfully — that they do not expect a protracted battle with Senate Republicans over the nominee. But lifetime appointments to the court are part of a president's most lasting legacy, and few in the modern era have been controversy-free.

Robert Barnes and William Branigin, "Justice John Paul Stevens to retire from court this summer," *The Washington Post*, (15:18 EDT 9 April 2010)

<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html> .

Commenting on the word choice in the last paragraph quoted above, *all* appointments to the federal judiciary are "lifetime appointments" (go read the U.S. Constitution). The U.S. Supreme Court matters because no court can overrule it, so it is the final opportunity to obtain the right result or to say what the law is.

The New York Times agreed with the *Post's* assessment of potential nominees:

By all accounts, the three front-runners are Solicitor General Elena Kagan and two appeals court judges, Diane P. Wood of Chicago and Merrick B. Garland of Washington. The main choices of liberals are not in the top tier.

Ms. Kagan, considered by some Democrats as the most likely candidate, could be hard for Republicans to block given her lack of a judicial paper trail and her support from conservatives who appreciated her opening the doors to them when she was the dean of Harvard Law School.

³ Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> (Aug 2009).

⁴ *Ibid.*

Judge Garland, who is well known and well regarded in Washington's political and legal circles, is widely seen by Republicans and Democrats as the safest choice, most likely to draw overwhelming bipartisan support. Judge Wood, who is less known in Washington, would be the favorite of liberals among the top three and has written decisions on abortion and religion that would generate more fire from the right.

Peter Baker and Carl Hulse, *The New York Times*, G.O.P. Weighs Political Price of Court Fight (10 April 2010)

<http://www.nytimes.com/2010/04/11/us/politics/11supreme.html>

On Monday, 12 April, the Associated Press confirmed⁵ the names of seven of the approximately ten candidates on Obama's short list:

- Diane Wood, judge on the U.S. Court of Appeals in Chicago since 1995
- Merrick Garland, judge on the U.S. Court of Appeals in Washington, DC since 1997
- Elena Kagan, former Dean of Harvard Law School (2003-2009) and currently U.S. Solicitor General
- Leah Ward Sears, former Georgia Chief Justice (2005-2009) and currently a member of the Schiff Hardin law firm in Atlanta
- Jennifer Granholm, governor of Michigan
- Janet Napolitano, former governor of Arizona and currently Homeland Security Secretary
- Sidney Thomas, judge on the U.S. Court of Appeals in Montana since 1996

Note that 5/7 (70%) are women. In the above list, I added information on credentials to what was given in the Associated Press story. Also on 12 April, the White House killed speculation that Obama would nominate Hillary Clinton to replace Justice Stevens.

How did Judge Sidney Thomas suddenly appear on the list of potential nominees? Apparently U.S. Senator Max Baucus (D-Mont.) suggested Thomas to President Obama.

On 13 April, two possible candidates — U.S. Senators Amy Klobuchar (D-Minn.) and Sheldon Whitehouse (D-RI) — said they were *not* interested in being a Justice.

On 20 April, the Associated Press reported⁶ that Martha Minow, the current dean of the Harvard Law School, is on the list of approximately ten people who President Obama is considering.

⁵ Ben Feller, "Source: Judge Sidney Thomas on Supreme Court list," Associated Press (15:08 EDT 12 April 2010).

⁶ Ben Feller, "Obama talking to possible court picks," Associated Press (21:30 EDT, 20 April 2010).

On 21 April, the *Los Angeles Times* reported that President Obama is also considering Ann Claire Williams. Judge Williams has served on the U.S. Court of Appeals in Chicago since 1999. Previously, she was a judge in U.S. District Court (1985-99), graduated from Notre Dame Law School in 1975, and was briefly a music teacher in Detroit public schools. No doubt, amongst her main qualifications is that she is black and a woman.

On Sunday, 18 April, *The Washington Post* published a story about how Republicans might criticize Elena Kagan position on military recruiting at Harvard University.⁷ On Monday, 19 April, the *Post* published a similar story about how Republicans might criticize Diane Wood for her support of abortion rights.⁸ On 23 April, the *Post* published a third story about how Merrick Garland was not liberal enough.⁹

my comments on nominees
Elena Kagan

One disadvantage of selecting U.S. Solicitor General Elena Kagan is that she would need to recuse herself from all cases in which the U.S. Government is a party during the first few years of her service as a Justice, because she worked on the Government's case as Solicitor General. Strangely, commentary about Kagan in the news media has focused mostly on her opposition to military recruiting on the Harvard campus, because of the military's policy of not allowing openly homosexual personnel.

Personally, I am troubled by Kagan's apparent lack of opinions on important issues in law and society (see Goldstein's comments quoted at page 5, above). I don't understand how a 49 y old law professor can have what is described as a meager paper trail — professors are *expected* to publish scholarly articles that analyze judicial opinions and expose errors or defects in law. We should *not* reward people for avoiding taking a position on a controversial topic that is important to society.

⁷ Amy Goldstein, "Foes may target Kagan's stance on military recruitment at Harvard," *The Washington Post*, p. A03 (18 April 2010)
<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/17/AR2010041701296.html> .

⁸ Peter Slevin, "Abortion rulings could bring scrutiny of possible Supreme Court pick Wood," *The Washington Post*, p. A05 (19 April 2010)
<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/18/AR2010041802596.html> .

⁹ Carol D. Leonnig, "Potential Supreme Court pick Garland could find foes on left," *The Washington Post*, p. A04, (23 April 2010)
<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/22/AR2010042205460.html> .

Diane Wood

Commentary about Judge Wood has focused on her support for abortion rights. However, journalists did *not* cite any cases. I searched Westlaw databases and found that Judge Wood wrote two opinions in one abortion rights case that were overturned by the U.S. Supreme Court: *National Organization for Women v. Scheidler*, 267 F.3d 687 (7thCir. 2001), *rev'd*, 537 U.S. 393 (2003), *on remand*, 91 Fed.Appx. 510 (7thCir. 2004) (remanded to U.S. District Court), *rev'd*, 547 U.S. 9 (2006). Technically, these cases were not about abortion itself, but rather about legal liability of some anti-abortion groups for their obnoxious conduct.

conclusion

I am distressed that politicians and journalists reduced the entire careers of these two women to their position on *one* issue (i.e., military recruitment on campus for Kagan, abortion rights for Wood).

I am sorry to say the whole process of selecting an nominee reminds me of a children's story, The Tree Bears, as Goldilocks sampled the three bowls of porridge in the bears' house: "This porridge is too hot. This porridge is too cold. This porridge is just right." And so, President Obama said: "This candidate is too conservative. This candidate is too liberal. And this candidate is not controversial at all." *<sarcastic smirk>*

Criteria

Most politicians and journalists are focused on opinions of potential nominees on various hot topics (e.g., equal rights for homosexuals, abortion, ownership of firearms, immigration). In contrast, I think there are other criteria that are more important than their opinions on hot topics.

1. Religion

During the early history of the USA, the U.S. Supreme Court justices were all Protestants. Justice Brandeis (appointed in 1916) was the first Jew. The first Catholic was Chief Justice Roger Taney (appointed in 1836), who began an intermittent tradition of one Catholic on the Court. Although it is taboo to say it, I think the trend for Republican presidents since 1980 to appoint Catholics to the Court is that Catholic attorneys are in the intellectual vanguard of the anti-abortion movement.

Does religion matter? I think it may in some cases. Beginning in the 1970s, abortion cases have been considered by the Court and it is well known that Catholic and Baptist dogma forbids abortion. Cases involving separation of religion from government (e.g., Ten Commandments in courtrooms, prayer in public schools, etc.) continue to be considered by the Court. These are some

of the more obvious examples of where a Justice's religion might influence his/her decision. I think religious diversity on the Court is important, but *not* the most important criterion.

On 7 April, Nina Totenberg of National Public Radio wrote:

With U.S. Supreme Court Justice John Paul Stevens talking openly about retirement, attention has focused on the "who" — as in who is on President Obama's short list of potential nominees. But almost nobody has noticed that when Justice Stevens retires, it is entirely possible that there will be no Protestant justices on the court for the first time ever.

Let's face it: This is a radioactive subject. As Jeff Shesol, author of the critically acclaimed new book *Supreme Power*, puts it, "religion is the third rail of Supreme Court politics. It's not something that's talked about in polite company." And although Shesol notes that privately a lot of people remark about the surprising fact that there are so many Catholics on the Supreme Court, this is not a subject that people openly discuss.

Nina Totenberg, "Supreme Court May Soon Lack Protestant Justices, National Public Radio," <http://www.npr.org/templates/story/story.php?storyId=125641988> (7 April 2010).

On 11 April 2010, *The New York Times* published an article that noted that the current U.S. Supreme Court has six Catholics, two Jews, and Justice Stevens is the only Protestant.

The short list of candidates to succeed Justice Stevens includes two Jews, Solicitor General Elena Kagan and Judge Merrick B. Garland of the United States Court of Appeals for the District of Columbia Circuit, and one Protestant, Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit, in Chicago.

Adam Liptak, "Stevens, the Only Protestant on the Supreme Court," *The New York Times*, <http://www.nytimes.com/2010/04/11/weekinreview/11liptak.html> (11 April 2010).

If President Obama feels that religion is important, nominating Judge Wood is a way to maintain one Protestant Justice on the U.S. Supreme Court.

Interestingly, many commentators suggest that religion is no longer important in choosing a Justice. If that is true, why doesn't a president nominate an atheist, something that has never happened in the more than 210 years of Court history? A nationwide opinion poll of 900 registered voters on 20-21 April found that only 39% "would be comfortable with an atheist" on the Court.¹⁰

¹⁰ Dana Blanton, "Fox News Poll: Most OK With No Protestants on Supreme Court," Fox News, <http://www.foxnews.com/politics/2010/04/27/fox-news-poll-okay-protestants-supreme-court/> (28 April 2010).

2. Ivy League background

There is a cliché that there are three ways of doing something: (1) the right way, (2) the wrong way, and (3) the Navy way. The wisdom in this cliché is reflected in the refusal of some universities to hire their own graduates, in order to avoid a kind of academic incest that perpetuates dynasties and *one* way of thinking. In this context, most of the recent Justices on the U.S. Supreme Court graduated from law school at either Harvard or Yale Universities.

I believe that is desirable that Justices come from many different law schools. Amongst the major candidates, this criterion favors Judge Wood, who graduated from the University of Texas Law School.

Judge Merrick Garland, Solicitor General Kagan, and Governor Granholm all graduated from Harvard Law School. Martha Minow graduated from Yale Law School.

Graduating from a top law school (e.g., Yale, Harvard, or Stanford) seems to be more important than what one has done with their life — how many law review articles they wrote, how many appellate cases they argued, how many significant new ideas they have convinced others to adopt. The mystique about graduating from a prestigious law school is similar to being a member of a royal family in Europe, or a very wealthy family in the USA. The mystique is illogical, irrational, and total irrelevant to selecting candidates on merit.

3. Outside the Judicial Monastery?

Some politicians have urged President Obama to nominate a Justice who has never been a judge.¹¹ This seems strange to me. The U.S. Supreme Court is the most important group of judges in the USA. Nominating someone without judicial experience to the Court is like choosing a nonsurgeon to write a textbook of surgery. With a mere five Justices required for a majority, it is scary to nominate people without previous judicial experience that shows the intellectual quality of their judicial opinions.

A professor of law, with expertise in constitutional law, *might* make a good Justice. But why should we take the risk of a professor with no previous judicial experience might be a good Justice, when there is an ample supply of experienced judges with a track record? For example, there are 179 judges on the U.S. Courts of Appeals. 28 U.S.C. § 44 (2009).

¹¹ In May 2009, Patrick Leahy, chairman of the U.S. Senate Judicial Committee, famously remarked that he wanted to see a nominee who was “from outside the judicial monastery”.

4. Geography

If we look at the current Justices and where they lived before they were appointed to the Court, we see a concentration of Justices from the Northeastern USA:

Roberts	Washington DC
Scalia	Washington DC
Kennedy	California
Thomas	Washington DC
Ginsburg	Washington DC
Breyer	Massachusetts
Alito	New Jersey
Sotomayor	New York City

Three of the four most recent former Justices were from outside the Northeastern USA: O'Connor and Rehnquist were both from Arizona, Souter was from New Hampshire, and Stevens was from Chicago.

There are regional differences in the USA. For example, arid western states care about water rights law, which is unimportant in the Northeastern USA. But I suspect that many other attitudes (e.g., firearms ownership) may be more a difference between people who live in big cities (i.e., where firearms are dangerous) and isolated ranches (i.e., where firearms are essential). Because law schools and appellate courthouses tend to be in big cities, it would be difficult to find qualified candidates for Justice of the U.S. Supreme Court in small towns. Nonetheless, I think geographic diversity is useful on the Court. Amongst the potential nominees, this criterion favors Judge Diane Wood from Chicago and Judge Sidney Thomas from Montana.

The Associated Press produced a news story on 2 May that said:

Not since the Allegheny Mountains (ranging through Pennsylvania, Maryland, West Virginia, and Virginia) were the western frontier of the newly created United States has the high court's membership been so concentrated.

....

Three justices on the current court were born or raised in New York City — Brooklyn-born Ruth Bader Ginsburg; Antonin Scalia, raised in Queens; and Bronx native Sonia Sotomayor. Manhattan-born Kagan would make four, but Obama could make the case for a certain geographical diversity all the same. Of the city's five boroughs, only Staten Island would be unrepresented.

Mark Sherman, "I-95 high court in need of some regional diversity," Associated Press (02:12 EDT, 2 May 2010).

9-20 April 2010

On Friday morning, 9 April 2010, Justice Stevens announced he would retire at the end of the Court's current term, which ends in June 2010.

1. Obama on 9 April

President Obama promptly responded to Justice Stevens' notice of retirement with the usual platitudes, tired rhetoric, and clichés in his remarks:

When President Ford was faced with a Supreme Court vacancy shortly after the nation was still recovering from the Watergate scandal, he wanted a nominee who was brilliant, nonideological, pragmatic, and committed above all to justice, integrity, and the rule of law. He found that nominee in John Paul Stevens.

Justice Stevens has courageously served his country from the moment he enlisted the day before Pearl Harbor to his long and distinguished tenure on the Supreme Court. During that tenure, he has stood as an impartial guardian of the law. He has worn the judicial robe with honor and humility. He has applied the Constitution and the laws of the land with fidelity and restraint. He will soon turn 90 this month, but he leaves his position at the top of his game. His leadership will be sorely missed, and I just had an opportunity to speak with him and told him on behalf of a grateful nation, that I thanked him for his service.

As Justice Stevens expressed to me in the letter announcing his retirement, it is in the best interests of the Supreme Court to have a successor appointed and confirmed before the next term begins. And so I will move quickly to name a nominee, as I did with Justice Sotomayor.

Once again, I view the process of selecting a Supreme Court nominee as among my most serious responsibilities as President. And while we cannot replace Justice Stevens' experience or wisdom, I will seek someone in the coming weeks with similar qualities — an independent mind, a record of excellence and integrity, a fierce dedication to the rule of law, and a keen understanding of how the law affects the daily lives of the American people. It will also be someone who, like Justice Stevens, knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens. Much like they did with Justice Sotomayor, I hope the Senate will move quickly in the coming weeks to debate and then confirm my nominee so that the new Justice is seated in time for the fall term.

President Obama, Remarks in Rose Garden,

<http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>

(14:03 EDT, 9 April 2010). Obama is often identified as a former “constitutional law professor”, so it is distressing that Obama did not mention a single case in which Justice Steven wrote the majority opinion or an eloquent dissenting opinion. When real law professors talk, names of cases are routinely mentioned. One wonders if Obama has actually read a judicial opinion written by Justice Stevens.

Obama could “replace Justice Stevens experience or wisdom” by nominating Judge Richard Posner, of the U.S. Court of Appeals for the Seventh Circuit. But Posner, who was born in 1939, is conventionally considered too old to be appointed, although he is twenty years younger than Stevens. If Obama wants a younger nominee, how about Judge Frank Easterbrook, who was born in 1948? Easterbrook is Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. Posner and Easterbrook are the two judges on the U.S. Courts of Appeals with the most citations by federal judges outside their circuit, which is evidence of their influence.¹²

Obama did *not* mention his disastrous “empathy” standard that he used in 2009, but his remarks quoted above do mention a requirement for a “keen understanding of how the law affects the daily lives of the American people.” Obama’s criterion suggests to me that he wants a Justice who will vote against criminalization of marijuana and cocaine use, because many americans desire to use these illicit drugs for recreational use. This is a silly requirement. Obama is spewing propaganda designed to appeal to voters who have no understanding of law.

2. politics

In March 2010, the U.S. Congress passed a so-called health care reform legislation that was unanimously opposed by Republicans in the U.S. Senate and U.S. House of Representatives. The memories of the partisan fight over health care, including anger by many conservative citizens, will still be alive when the Senate considers the President’s nomination to the U.S. Supreme Court. Moreover, elections for all of the Representatives and one-third of the Senate will be held on 2 Nov 2010, so some senators may want to make a spectacle that will attract support of voters.

In view of this partisan environment, on 4 April 2010, Senator Arlen Specter — a long-time member of the Senate Judiciary Committee — appeared on the Fox News Sunday television program and urged Justice Steven *not* to retire in 2010:

Chris Wallace [anchor]: Senator Specter, if there is a vacancy, do you have some thoughts about the type of person that President Obama should nominate?

SPECTER: I hope to begin a little earlier, that Justice Stevens does not retire this year. I think the gridlock in the Senate might well produce a filibuster which would tie up the Senate about a Supreme Court nominee. I think if a year passes, there's a much better chance we could come to a consensus.

“Transcript: Sens. Kyl, Specter on ‘FNS’ ” (5 April 2010)

<http://www.foxnews.com/story/0,2933,590424,00.html> .

See also, Perry Bacon, Jr., “Specter urges Justice Stevens to remain on court,” *The Washington Post*, (14:00 EDT 4 April 2010)

<http://voices.washingtonpost.com/44/2010/04/specter-urges-justice-stevens.html>

¹² Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> at pp. 20-21 (3 Aug 2009).

Glenn Thrush at the Politico website wrote the following commentary:

Liberal leaders see the resignation of Justice John Paul Stevens as a once-in-a-term opportunity for Obama to nominate an unabashed liberal to balance an increasingly conservative high court — while energizing the demoralized Democratic base just in time for the midterms.

But few if any of the eight to ten potential nominees being mulled by the White House are progressive firebrands, and White House officials aren't keen to pick a major new fight after the year-long health care battle, according to people close to the process.

"The bottom line," said an administration official, "is that we want to walk in there with someone who is confirmable."

....

Two of the top-tier three nominees widely mentioned for the job — U.S. Solicitor General Elena Kagan and Merrick Garland, a U.S. Court of Appeals judge — are relatively noncontroversial and have a good track record with Senate conservatives, Hill Democrats say. [¶] A third, 59-year-old Diane Wood, is a passionate judicial defender of abortion rights who has clashed with conservatives on the Court of Appeals for the Seventh Circuit in Chicago and is the one short-lister likely to spark a serious battle.

....

... progressives, unions and abortion rights groups have been quietly pressuring the White House to make a bold pick, even though they have yet to coalesce around any particular candidate. One labor official summed up the attitude, saying, "If Obama nominates someone who has a boring confirmation hearing and gets 70-plus votes... it means we missed an opportunity."

....

Obama, who has an innate desire to be viewed as a bipartisanship-seeking moderate, has plenty of reason to dodge a fight. While some Senate liberals want a pitched battle, he already has an uncommonly crowded legislative agenda in an election year, and most in Congress are girding themselves for huge fights on regulatory reform, climate change and new jobs bills.

"The Senate is exhausted," said Sen. Dianne Feinstein (D-Calif.), a moderate member of the Judiciary Committee. "We need 60 votes. I think we need a candidate who is bipartisan, who has the credentials who is respected on both sides of the aisle is what we need to have a quick confirmation... I don't think we need a fight that drags through the summer."

Glenn Thrush, Obama doesn't want SCOTUS fight, Politico (20:11 EDT, 10 April 2010)

<http://www.politico.com/news/stories/0410/35604.html> .

related confirmation battles

In a little detail ignored by nearly everyone, there was the issue of filling the Office of Legal Counsel in the Justice Department. In January 2009, President Obama nominated Dawn Johnsen, a professor of law at Indiana University who had served as acting head of that Office during 1997-98. Her nomination was approved by the Senate Judiciary Committee in March 2009, but she never received a vote by the full Senate. On 9 April 2010, the same day as Stevens announced his retirement, Johnsen withdrew her stalled nomination. The withdrawal of her nomination was surely noticed by Obama and might influence Obama's choice of a less controversial nominee to the U.S. Supreme Court. It's not clear why some Democrats opposed her, but she was legal counsel to a pro-choice (abortion) organization during 1988-93, and she had been very critical of terrorist interrogations and confinement of terrorists at Guantanamo during the Bush-Cheney administration. In my opinion, she was a good candidate and her lack of confirmation indicates a problem in the Senate that may also affect nominees for the U.S. Supreme Court.

On 24 Feb 2010, President Obama nominated Prof. Goodwin Liu, a law professor at the University of California at Berkeley, to a seat on the U.S. Court of Appeals in San Francisco. Prof. Liu is liberal and therefore is opposed by Republicans. On 16 April 2010, the Senate Judiciary Committee held hearings on the Liu nomination, in what could be a prelude to the spectacle in the Senate if Obama were to nominate a liberal candidate to the U.S. Supreme Court. The hearings for Liu were only 3½ hours, unlike the three days allotted to a nominee for the Supreme Court. On 6 May 2010, Republicans were granted a one-week delay in the vote on Liu in the Senate Judiciary Committee. On 13 May 2010, the Judiciary Committee voted 12 to 7 to approve Liu, the vote was along strict party lines with all Republicans voting against. The full Senate never voted on Liu's nomination. Instead, on 6 Aug 2010, the Senate returned Liu's nomination to the president.

3. dearth of news during 14-20 April

On 13 April, the only mention in the news media of the replacement of Justice Stevens was a little news item that President Obama had scheduled a meeting on 21 April with Senators Reid (leader of the Democrats), Leahy (chairman of the Judiciary Committee), McConnell (leader of Republicans), and Sessions (ranking Republican on the Judiciary Committee). Since Obama already has a list of ten candidates, why is he waiting eight days to schedule a meeting about his nominee? It is interesting that Obama only invited leaders, not senators who actually know something about the U.S. Supreme Court (e.g., Arlen Specter, Russ Feingold, John Cornyn, etc.).

As an indication of how unimportant the replacement of Justice Stevens is to politicians and citizens, this story was absent from news media on Wednesday, 14 April — only five days after Justice Stevens announced his retirement. Even at *The Washington Post*, the news drought about the nomination continued on 14-15 April. Apparently, the real effect of Obama scheduling a meeting on 21 April was to delay the news story until then.

While journalists were ignoring the replacement of Justice Stevens during 14-20 April, what stories were they reporting? A volcano in Iceland created a cloud of ash that drifted east and caused cancellation of airplane flights in Europe and England, beginning 15 April. Democrats in the U.S. Senate proposed legislation to reform financial institutions. More people were killed in Pakistan and Afghanistan by terrorists. Ten years from now, all of these top news stories will have been forgotten, but the replacement for Justice Stevens will continue to affect the USA through her/his decisions on the U.S. Supreme Court. On the other hand, with a recession continuing from the year 2008, and with continuing high unemployment, many people in the USA may be more concerned with surviving the current year than concerned with the future of the U.S. Supreme Court.

21 April - 7 May 2010

1. Obama on 21 April

On 21 April, President Obama spoke to journalists for a few minutes and answered only one question on the subject of who he would nominate to replace Justice Stevens. The entire event was only five minutes.

THE PRESIDENT: All right, everybody. We are here to talk about the Supreme Court. Obviously, we have lost one of — the services of one of the finest Supreme Court Justices that we've seen. Justice Stevens announced that he will be retiring at the end of this term. Those are going to be some tough shoes to fill. This is somebody who operated with extraordinary integrity and fidelity to the law.

But I'm confident that we can come up with a nominee who will gain the confidence of the Senate and the confidence of the country, and the confidence of individuals who look to the Court to provide evenhanded justice to all Americans.

Last time, when I nominated Sonia Sotomayor, I have to say that all the individuals who are sitting here — Mitch McConnell, Harry Reid, Jeff Sessions and Patrick Leahy — worked very cooperatively on what I considered to be a smooth, civil, thoughtful nomination process and confirmation process. And I very much thank particularly the Ranking Member and the Chairman of the Judiciary Committee for running a smooth process.

My hope is, is that we can do the exact same thing this time. Last time the nomination went up at the end of May. We are certainly going to meet that deadline and we hope maybe we can accelerate it a little bit so that we have some additional time. But my hope is that we're going to be able to get a Supreme Court nominee confirmed in time for the next session.

As Justice Stevens said, I think it's very important, particularly given the important cases that may be coming before the Supreme Court, that we get this process wrapped up so that a new justice can be seated and staffed and can work effectively with his or her colleagues in time for the fall session.

So I just want to again thank all of these gentlemen for their input. They are here to consult with me. One of the things that we did last time was to listen to the thoughts and views of our colleagues before I nominated a candidate. I take this process very seriously. And so I'm going to be interested in hearing their thoughts and concerns before any final decisions are made.

All right. With that, let me call on one question. Ben, you get the shot.

Q Thank you, Mr. President. Would you be willing to nominate someone who did not support a woman's right to choose?

THE PRESIDENT: You know, I am somebody who believes that women should have the ability to make often very difficult decisions about their own bodies and issues of reproduction. Obviously this has been a hugely contentious issue in our country for a very long time. I will say the same thing that every President has said since this issue came up, which is I don't have litmus tests around any of these issues.

But I will say that I want somebody who is going to be interpreting our Constitution in a way that takes into account individual rights, and that includes women's rights. And that's going to be something that's very important to me, because I think 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.

All right. Thank you. I appreciate it.

Q Are you getting close to a decision?

THE PRESIDENT: You know, I think we've got some terrific potential candidates.

Remarks by The President before Meeting with Bipartisan Leaders of the Senate and the Senate Judiciary Committee, (10:43-48 EDT, 21 April 2010)

<http://www.whitehouse.gov/the-press-office/remarks-president-meeting-with-bipartisan-leaders-senate-and-senate-judiciary-commi> .

Interestingly, Obama made this speech *before* his meeting with four leaders of the U.S. Senate. If Obama had waited until *after* his meeting on the topic, he might have had more information to share with the American people.

The New York Times reported on the top candidates for the nomination and the 21 April meeting between President Obama and four Senators:

While most of the 10 candidates do not have much chance of being selected this time out, advisers said one reason to look at so many was to have a stable of potential nominees ready in case another seat becomes vacant sooner than expected. The White House is preparing for the situation that President George W. Bush faced in 2005 when he suddenly had two seats to fill at once after Justice Sandra Day O'Connor retired and Chief Justice William H. Rehnquist died.

Four of Justice Stevens's colleagues are over 70, and some have had health problems, and although none has given any indication recently about considering retirement, Mr. Obama could very well have a third vacancy before his term is over.

Mr. Obama has talked with several candidates, but advisers would not identify which ones.

Besides Ms. Kagan, advisers said the front-runners included two appeals court judges, Merrick B. Garland of Washington, and Diane P. Wood of Chicago. Mr. Obama, they said, has also grown intrigued with two other appeals judges, Sidney R. Thomas of Montana and Ann Claire Williams of Chicago, although they may be tryouts for a future opening.

The other five are Gov. Jennifer M. Granholm of Michigan; former Chief Justice Leah Ward Sears of the Georgia Supreme Court; Martha Minow, dean of Harvard Law School; Justice Carlos R. Moreno of the California Supreme Court; and Homeland Security Secretary Janet Napolitano.

Mr. Obama met in the Oval Office on Wednesday with Senators Harry Reid of Nevada, the Democratic majority leader; Mitch McConnell of Kentucky, the Republican minority leader; Patrick J. Leahy of Vermont, the Judiciary Committee chairman; and Jeff Sessions of Alabama, the committee's senior Republican.

Participants said afterward that no names were discussed, although there was discussion about the merits of picking someone from outside what Mr. Leahy calls the "judicial monastery," like a politician.

In an interview afterward, Mr. Sessions called the meeting "a healthy thing" and said he did not agree with Mr. Emanuel's presumption that there will be a big fight but added that it depended on whom Mr. Obama picked.

Peter Baker, "Obama Meets With Senators in Effort to Speed Court Choice," *The New York Times*, <http://www.nytimes.com/2010/04/22/us/politics/22nominate.html> (21 April 2010).

2. dearth of news during 22 April to 6 May

Surprisingly, after Obama's 21 April meeting with four Senators, there was again a dearth of news about the nominee to replace Justice Stevens. During this time, journalists reported on three major stories: (1) a new statute in Arizona designed to reduce the number of illegal immigrants there, (2) an oil well disaster on 20 April off the coast of Louisiana that killed 11 people and spilled crude oil at the rate of 200,000 gallons/day, and (3) an immigrant from Pakistan who parked a defective car bomb in New York City at 18:30 on 1 May and who was arrested at midnight on 3 May.

3. Interviews

On Thursday, 29 April, President Obama interviewed Judge Sidney Thomas for one hour.¹³ This was Obama's first known interview of a Supreme Court nominee in 2010. The following day, journalists reported that Obama had also recently met with Judge Merrick Garland.¹⁴

Obama interviewed two other top candidates (i.e., Wood, Kagan) in 2009. It is not known if interviews in 2009 are still valid in 2010, or whether interviews need to be repeated annually, like

¹³ Ben Feller, "Obama interviews Thomas for high court," Associated Press (02:31 EDT, 30 April 2010).

¹⁴ Ben Feller, "Obama interviews Thomas, Garland for high court," Associated Press (16:52 EDT, 30 April 2010).

influenza immunizations. <grin> A few days later, it became apparent that interviews need to be repeated annually.

Obama interviewed Solicitor General Kagan on Friday, 30 April. Obama interviewed Judge Diane Wood on Tuesday, 4 May.¹⁵ Apparently the four candidates (e.g., Wood, Kagan, Garland, and Thomas) are the final four being considered by President Obama, because no other candidates are known to have been interviewed.

On 4 May 2010, Jesse Holland, an Associated Press reporter, wrote about the despair of liberals:

Liberals fear that after they helped elect President Barack Obama he'll abandon them when he nominates a Supreme Court justice, choosing a consensus-building moderate rather than a liberal in the mold of retiring Justice John Paul Stevens.

If that's Obama's plan, liberals say a Democratic administration holding a significant majority in the Senate could be blamed for sending the nation's highest court tilting farther to the right, a significant betrayal for an administration that will need help from its hard-core supporters in a fierce confirmation battle and midterm congressional elections.

....

The 90-year-old retiring justice "is a liberal icon and was considered the leader of the left side of the court," [George Washington University Law School professor Jonathan] Turley said. "To replace him with someone with a more conservative record would be considered a terrible breach of faith with many of Obama's supporters."

Jesse J. Holland, "Liberals fear Obama nominates moderate to court," Associated Press (12:08 ET 4 May 2010). The problem is that liberals will certainly vote for Democrats — liberals have no other reasonable choice, so President Obama does *not* need to satisfy his liberal constituents. Instead, Obama is reaching out to moderates and independent voters, who might otherwise vote for Republican politicians. This may be smart politics, but nomination of a moderate candidate to replace the liberal Justice Stevens would push the Court further toward the conservative side.

delay is good

Obama could have nominated someone on 10 April. So why is President Obama waiting, moving at a glacial pace? My answer is that if Obama nominated someone on 10 April, instead of, for example 14 May, the opposition-party politicians would have an extra five weeks to find reason(s) to oppose his nominee. This is not an optimal way to govern, but it is a practical way. But given that Obama is likely to nominate someone relatively noncontroversial (i.e., *not* an ultraliberal law professor), and given that the Senate nearly always confirms the President's nominee, the real effect of the delay is to inconvenience the new Justice. I say inconvenience,

¹⁵ Ben Feller, "Obama interviews Diane Wood for Supreme Court," Associated Press <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404312.html> (19:41 EDT, 4 May 2010); Anne E. Kornblut, "Obama sits down with Diane Wood in latest Supreme Court meeting," *The Washington Post*, (19:22 EDT, 4 May 2010) <http://voices.washingtonpost.com/44/2010/05/obama-sits-down-with-diane-woo.html>

because, after confirmation in early August, she must quickly find a new house, move to Washington, DC, and begin a new job on 4 October 2010.

But *if* the President were to nominate her five weeks earlier, she would not necessarily be confirmed by the Senate five weeks earlier. The opposition party in the Senate could delay hearings, and delay votes, so that her date of confirmation is the same, regardless of when she is nominated. Given this grim, inefficient confirmation process, it is reasonable to delay her nomination, to minimize the confirmation process.

4. rumors of Kagan on 7 May

Friday morning, 7 May, Politico reported a rumor that Obama would nominate Kagan:

Look for President Obama to name his Supreme Court pick Monday [10 May], and look for it to be Solicitor General Elena Kagan, a former Harvard Law dean. The pick isn't official, but top White House aides will be shocked if it's otherwise. Kagan's relative youth (50) is a huge asset for the lifetime post. And President Obama considers her to be a persuasive, fearless advocate who would serve as an intellectual counterweight to Chief Justice Roberts and Justice Scalia, and could lure swing Justice Kennedy into some coalitions. For now, aides say POTUS hasn't decided, to their knowledge.

Mike Allen, "Obama's Court pick is imminent," *Politico* (07:48 ET, 7 May 2010).

Friday evening, Reuters was less certain:

President Barack Obama will announce his nominee for the U.S. Supreme Court very soon, White House officials said on Friday, as court watchers said Solicitor General Elena Kagan is most likely to be the pick.

Although there is no guarantee she is the nominee, Kagan could be expected to pass fairly smoothly through the confirmation process, experts say. [¶] Administration officials are eager to avoid a bitter battle over the court pick ahead of congressional elections in November, where Obama's fellow Democrats will be fighting to keep their majorities in Congress. [¶] Considered one of the more moderate choices on Obama's short list of potential court nominees, Kagan has been through one Senate confirmation already — she was confirmed last year for her current position. [¶] In March 2009, Kagan was confirmed as U.S. solicitor general by a divided Senate, 61-31. All the "no" votes were cast by Republicans, including Arlen Specter, who has since switched parties to become a Democrat.

....

Obama has interviewed at least four people for the vacancy, including two women — Kagan, and federal appeals court Judge Diane Wood, one of the most liberal of the potential nominees. [Wood] would face the toughest confirmation fight but is also considered a favorite.

....

Legal experts warned that rumors are no guarantee that Obama would pick Kagan. Patricia Zengerle, "Obama Court pick imminent, Kagan called favorite," Reuters (17:25 EDT, 7 May 2010).

The effect of these rumors reported by journalists may encourage President Obama to announce his nominee on 10-11 May. Otherwise, Obama will appear *indecisive* and vacillating. Personally, I am still hoping that Obama will have the courage to nominate Judge Diane Wood, because the Court's needs her liberal outlook and her diversity in geography, religion, and non-Ivy League education.

Reasons Against Kagan

During late April and early May 2010, various journalists and commentators began writing about the disadvantages of nominating Kagan. That's not surprising, because the conventional wisdom is that Obama will nominate Kagan, making her *the* target to attack.

On 13 April 2010, a legal commentator argued against selecting Kagan. I am condensing his five-page article to a few lines:

1. Kagan's lack of a record One of the difficulties in assessing Kagan's judicial philosophy and view of the Constitution is that direct evidence is extremely sparse. That's not only because she's never been a judge, but also because (a) her academic career is surprisingly and disturbingly devoid of writings or speeches on most key legal and Constitutional controversies, and (b) she has spent the last year as Obama's Solicitor General, where (like any lawyer) she was obligated to defend the administration's policies regardless of whether she agreed with them.

2. I believe Kagan's absolute silence over the past decade on the most intense Constitutional controversies speaks very poorly of her. Many progressives argued (and I certainly agree) that the Bush/Cheney governing template was not merely wrong, but a grave threat to our political system and the rule of law. It's not hyperbole to say that it spawned a profound Constitutional crisis.

3. [Kagan appears to support expanded presidential powers.]

What makes the prospect of a Kagan nomination so disappointing is that there are so many superior alternatives — from the moderately liberal and brilliant 7th Circuit Judge Diane Wood and former Georgia Supreme Court Chief Justice Leah Ward Sears to the genuinely liberal Harold Koh (former Yale Law School Dean and current State Department counselor) and Stanford Law Professor Pam Karlan.

Glenn Greenwald, "The case against Elena Kagan," *Salon.com*, (09:13 ET 13 April 2010)

http://www.salon.com/news/opinion/glenn_greenwald/2010/04/13/kagan .

I agree with Greenwald's analysis, especially his conclusion that nominating Kagan would move the court toward the conservatives, by replacing liberal Justice Stevens with moderate Kagan, who supports expanded presidential powers.

On 8 May, Greenwald posted some additional reasons to oppose Kagan. Glenn Greenwald, "The latest on Elena Kagan," *Salon.com*, (09:09 ET, 8 May 2010)

http://www.salon.com/news/opinion/glenn_greenwald/2010/05/08/kagan/index.html .

Journalists reported that during 2005-2008 Kagan was a paid member of an advisory panel to the investment firm of Goldman Sachs, which is blamed from some of the current economic crisis in the USA.¹⁶ This is guilt by association, but it does not help her candidacy.

On 1 May, Prof. Paul Campos of the University of Colorado Law School wrote a damning review of Elena Kagan:

Yesterday, I read everything Elena Kagan has ever published. It didn't take long: in the nearly 20 years since Kagan became a law professor, she's published very little academic scholarship—three law review articles, along with a couple of shorter essays and two brief book reviews. Somehow, Kagan got tenure at Chicago in 1995 on the basis of a single article in *THE SUPREME COURT REVIEW*—a scholarly journal edited by Chicago's own faculty—and a short essay in the school's law review. She then worked in the Clinton administration for several years before joining Harvard as a visiting professor of law in 1999. While there she published two articles, but since receiving tenure from Harvard in 2001 (and becoming dean of the law school in 2003) she has published nothing. (While it's true law school deans often do little scholarly writing during their terms, Kagan is remarkable both for how little she did in the dozen years prior to becoming Harvard's dean, and for never having written anything intended for a more general audience, either before or after taking that position.)

....

.... But if Kagan is a brilliant legal scholar, the evidence must be lurking somewhere other than in her publications. Kagan's scholarly writings are lifeless, dull, and eminently forgettable. They are, on the whole, cautious academic exercises in the sort of banal on-the-other-handing whose prime virtue is that it's unlikely to offend anyone in a position of power. ¶ Kagan's work reminded me of Orwell's observation that, if book reviewers were honest, 19 of 20 reviews would consist of the sentence, "this book inspires in me no thoughts whatever." This is a problem not only because we have no evidence regarding what her views might be on almost any important legal question, but also because Kagan's supposed academic achievements are being touted as the primary justification for putting someone who has never been a judge on the nation's highest court. Now the fact that Kagan is more or less an academic nonentity would be of merely academic interest if she possessed unrelated but compelling qualifications for ascending to the nation's highest court. But what else, exactly, has she done?

Besides her law-school career, Kagan's resume consists of four years in the Clinton White House, where she was Associate White House Counsel—a full rung down from Harriet Miers' position in the Bush White House—and Deputy Director of the Domestic Policy Council, and six years as the dean of Harvard's law school. (Last year, Obama chose her as his solicitor general).

¹⁶ Matt Kelley, "Possible Supreme Court pick had ties with Goldman Sachs," *USA Today*, http://www.usatoday.com/news/washington/judicial/2010-04-26-kagan_N.htm (02:14 ET, 27 April 2010); Ben Smith, "Kagan under fire on Goldman, minorities," *Politico*, http://www.politico.com/blogs/bensmith/0510/Kagan_under_fire_on_Goldman_minorities.html (11:34 EDT, 7 May 2010); Laura Meckler, "Kagan's Goldman Ties Won't Hurt Supreme Court Chances, White House Says," *Wall Street Journal*, (18:16 ET, 7 May 2010) <http://online.wsj.com/article/SB10001424052748703338004575230602921084726.html> .

Apparently her main accomplishment as dean at Harvard was raising a lot of money, which, given that it's the Harvard Law School, sounds roughly as impressive as managing to sell a lot of pot at a Grateful Dead concert. (She's also been given credit for improving the collegial atmosphere at the school, a.k.a., getting a bunch of egomaniacs to engage in less backstabbing, which anyone familiar with law school faculties can attest is not a negligible accomplishment. Whether it's a sufficient basis for putting somebody on the Supreme Court is another matter.)

....

.... Indeed, the most impressive thing about Kagan is that she seems to have a remarkable ability to ingratiate herself with influential people across the ideological spectrum.

Paul Campos, "The Next Harriet Miers?" *The Daily Beast*, (19:30, 1 May 2010)
<http://www.thedailybeast.com/blogs-and-stories/2010-05-01/the-next-harriet-miers/full/> .

Prof. Campos compares Kagan to Harriet Miers, which is unkind to Kagan. Miers was a graduate of Southern Methodist University Law School and she had an undistinguished career in the private practice of law, before President George W. Bush appointed her to be White House counsel. On the other hand, Kagan earned her bachelor's degree, summa cum laude, from Princeton in 1981. Kagan attended Worcester College, Oxford, and received an M. Phil. in 1983. Kagan then attended Harvard Law School, where she was supervising editor of the Harvard Law Review, and graduated magna cum laude in 1986. She began teaching at University of Chicago law school in 1991 and became a tenured professor of law at University of Chicago in 1995 and tenured at Harvard in 2001, and was dean of Harvard Law School for five years, before being appointed as Solicitor General in 2009. Kagan is clearly more intellectually distinguished than Miers. Kagan's meager output of law review articles is more than Miers' output of zero articles. Miers withdrew as a nominee; but — if Obama nominates Kagan — then Kagan will surely be confirmed by the Senate. I think the real reason to oppose Kagan is that she is a stealth candidate, who has avoided taking stands on controversial topics in her twenty-year career, except for temporarily banning military recruiting at Harvard Law School.

Writing this essay is an unpaid, spare-time activity for me. I can not afford to spend days in law libraries reading and evaluating Kagan's work. Moreover, Kagan's interest in administrative law is outside of my interests and competence. However, in the interest of fairness, I do want to mention one blog that reached a different conclusion from the scathing remarks of Campos, quoted above. Prof. Eugene Volokh of the UCLA School of Law, and a First Amendment expert, wrote on 10 May:

1. Let me begin with some objective factors, rather than my own evaluation of Kagan's scholarship. As this excellent SCOTUSblog post chronicles, Kagan was a working scholar from 1991–95, and then 1999–2003. Between those years, she worked in the Clinton Administration; after those years, she was dean at Harvard Law School, a position that these days leaves its holder with very little time to do serious scholarship. In those eight years, she wrote or cowrote four major articles (linked to here), Presidential Administration (HARV. L. REV. 2001), *Chevron's* Nondelegation Doctrine (HARV. L. REV. 2001, cowritten with

David Barron), *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine* (U. CHI. L. REV. 1996), *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion* (SUP. CT. REV. 1993). She also wrote three shorter but still substantial pieces, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints* (U.C. DAVIS. L. REV. 1996), *Confirmation Messes, Old and New* (U. CHI. L. REV. 1995), and *Regulation of Hate Speech and Pornography After R.A.V.* (U. CHI. L. REV. 1993).

Quantitatively, this is quite good output for eight years as a working scholar. It looks a lot smaller if one looks at her career from 1991 to 2009, when she was appointed Solicitor General — but for the reasons I mentioned above, that’s not the right way to look at it.

Moreover, two of her articles have been judged to be quite important by her colleagues. Presidential Administration has been cited 305 times in law journal articles (according to a search of Westlaw’s JLR database) — an extraordinarily high number of citations for any article, especially one that is less than 10 years old. In fact, a HeinOnline list of all articles with more than 100 citations, run in August 2009, reports that her article was at the time the 6th most-cited law review article of all the articles published since 2000. Many legal scholars, even ones working in the relatively high-citation fields of constitutional law and administrative law, have never and will never write an article that is so much cited.

Chevron’s Nondelegation Doctrine has been cited 75 times, a very high number for an article’s first 10 years; I suspect that only a tiny fraction of one percent of all law review articles are cited at such a pace. *Private Speech, Public Purpose* has been cited 129 times, likewise a very high number. *The Changing Faces of First Amendment Neutrality* has been cited only 36 times, but that probably stems in large part from the fact that Supreme Court Review articles from that era are not on Westlaw or Lexis (ridiculous, especially for a faculty-edited journal with the SUPREME COURT REVIEW’s excellent reputation, and likely stemming from a short-sighted non-licensing decision by the University of Chicago Press).

....

2. On then to my own evaluation of the First Amendment articles: I think they’re excellent. I disagree with them in significant ways (this article, for instance, reaches results that differ quite a bit from those suggested by Kagan’s *Private Speech, Public Purpose* article, see, e.g., PDF pp. 8–9). But I like them a lot.

The articles attack difficult and important problems (*Private Speech, Public Purpose*, for instance, tries to come up with a broad theory to explain much of free speech law). They seriously but calmly criticize the arguments on both sides, and give both sides credit where credit is due. For instance, I particularly liked Kagan’s treatment of both the Scalia *R.A.V. v. City of St. Paul* majority and the Stevens concurrence, in her *Changing Faces of First Amendment Neutrality* article.

As importantly, the articles go behind glib generalizations and formalistic distinctions and deal with the actual reality on the ground, such as the actual likely effects of speech restrictions, and of First Amendment doctrine. This is legal scholarship as it should be, and as it too rarely is.

Eugene Volokh, “Elena Kagan as Scholar,” <http://volokh.com/2010/05/10/elena-kagan-as-scholar/> (15:47, 10 May 2010).

I am troubled by Kagan's lack of scholarly publications. I worry that she had talent for giving professors what they want to hear, which earned her good grades and *cum laude* degrees, but may have taught her to avoid creativity — and avoid novel thought — that might offend her professors. Later in her life, she seems to have avoided publishing articles that might offend either her colleagues or government officials who might appoint Kagan to some position.

On 7 May, the *Los Angeles Times*¹⁷ reported that one of Kagan's few law review articles had criticized the Senate confirmation process for Supreme Court Justices, calling the hearings: "a vapid and hollow charade". It is not smart to criticize the people who are reviewing and approving her nomination. But what shocked me was Kagan's assertion that nominees should disclose their views on controversial issues, such as abortion, affirmative action and privacy. Such disclosure would violate the impartiality that we should expect from *all* judges, including Justices on the Supreme Court.¹⁸ Furthermore, even if a nominee promises to vote a particular way after confirmation, such promises are *not* enforceable.¹⁹ Although the *Los Angeles Times* did not give a citation, Kagan's article can be found at: "Confirmation Messes, Old and New," 62 UNIV. CHICAGO LAW REVIEW 919 (Spring 1995), posted at: <http://lawreview.uchicago.edu/archive/Front%20Page/Kagan/ConfirmationMessesOldAndNew.pdf> . And her so-called article is actually a review of a book by Stephen Carter.

For a laudatory review of the impending Kagan nomination, see Tom Goldstein, "9750 Words on Elena Kagan," (01:00 EDT, 8 May 2010) <http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/> .

If Kagan becomes a Justice she will need to recuse herself for several years in cases involving the government, because of her current position as Solicitor General. Also, if Obama nominates Kagan, then Obama needs to find a replacement Solicitor General, which adds to Obama's work load and disrupts work in the Solicitor General's office. Additionally, Kagan's work as Solicitor General means she advocated for the government's (i.e., the President's) position in the courts during 2009 and the first four months of 2010, which may make her too deferential to the government. I am *not* questioning Kagan's integrity, I only note that working in the White House during the 1990s and her recent experience as Solicitor General gives her a background of advocating for what the President wanted, and shaped her opinions on issues.

¹⁷ David G. Savage, "Kagan's words may return to haunt her," *Los Angeles Times*, <http://articles.latimes.com/2010/may/07/nation/la-na-court-kagan-20100508> (7 May 2010).

¹⁸ See, e.g., Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> at pp. 5-9 (3 Aug 2009).

¹⁹ See, e.g., Standler, The Confirmation of Justice Sotomayor, pp. 73-76, <http://www.rbs0.com/sotomayor2.pdf> (7 Aug 2009).

On 25 May, *The New York Times* reported Kagan's intense ambition, using one job as a stepping stone to her next job.²⁰ *The Times* reported that Kagan attempted to become president of Harvard University, after president Summers "faltered". Because Summers had appointed Kagan dean of the law school, Summers saw Kagan as disloyal when she chose not to defend Summers. *The Times* characterized Kagan as "a woman of intense ambition and deft political skills."

Kagan earned tenure at the University of Chicago law school, then spent four years (1995-99) working in the White House during the Clinton presidency. Because she was absent from the University for too long, she forfeited her tenured position in Chicago. Her anticipated job as a judge on the U.S. Court of Appeals disappeared, because Republicans did not hold hearings on her nomination. When Kagan sought to return to the University of Chicago, the law school faculty failed to offer her a position.

The criticism leveled against her at the time echoes the knock on her now as she prepares for Senate hearings on her nomination to the U.S. Supreme Court: Her volume of scholarly writing is thin.

....

When Kagan decided it was time to return to the U. of C., several faculty members weren't convinced that she was devoted to academia and planned to spend her career there, recalled Geoffrey Stone, who was provost of the university at the time and who supported her reappointment. [9] There was no vote to reject her, but there was no offer, either. Christi Parsons, "U. of C. law faculty didn't back Kagan. No job offer when she sought return after Clinton duty," *Chicago Tribune*, <http://www.chicagotribune.com/news/local/ct-met-kagan-chicago-20100530,0,1471697.story> (30 May 2010). If her scholarship is so weak that she was not welcomed back at the University of Chicago Law School, is she really qualified to be a Justice of the U.S. Supreme Court?

Kagan lacks litigation experience

On 19 May 2010, I looked at the Questionnaire that Kagan submitted to the Senate Judiciary Committee in 2009, when she was being confirmed as U.S. Solicitor General. Despite spending most of her career at the University of Chicago and Harvard University, she is admitted to practice law in neither Illinois nor Massachusetts. She has never been admitted to practice in any U.S. Court of Appeals, and she was not admitted to the bar of the U.S. Supreme Court until she was nominated as Solicitor General in 2009, which suggests that she never intended to litigate appellate cases. Her lack of litigation experience suggests that she is an "observer" — *not* a "participant" — in appellate litigation. It's astounding that President Obama considers Kagan for appointment as a judge in *any* court, given that Kagan has avoided litigation for twenty years. People who criticize Kagan for her lack of judicial experience are missing the point — except for clerking for judges

²⁰ Sheryl Gay Stolberg, "At Harvard, Kagan Aimed Sights Higher," *The New York Times*, <http://www.nytimes.com/2010/05/26/us/politics/26kagan.html> (25 May 2010).

when she was 26-28 years old and except for one year as U.S. Solicitor General — Kagan has absolutely no appellate litigation experience, as either an attorney or a judge. This lack of experience is significant, because appellate litigation is the *only* activity of the U.S. Supreme Court.

For a comparison of Kagan with a law professor who was *both* a former Dean of Stanford Law School *and* an experienced appellate litigator, see page 36, below.

Eric Turkewitz, a personal injury lawyer in New York, noticed Kagan's lack of private practice experience, and commented that, amongst the nine Justices, only Justice Kennedy has any significant experience in private practice.

<http://www.newyorkpersonalinjuryattorneyblog.com/2010/05/elena-kagan-the-three-year-hole-in-the-resume.html>
(10 May 2010).

<http://www.newyorkpersonalinjuryattorneyblog.com/2010/06/elena-kagan-in-private-practice-and-her-first-amendment-experience.html>
(3 June 2010).

Reasons to Prefer Wood

David Lat, editor of the Above the Law blog, wrote the following article on 5 May. To comply with fair use in copyright law, I am greatly condensing his six-page article in the following quotation.

.... We realize that the betting men (and women) favor Solicitor General Elena Kagan. Kagan is also the pick of Tom Goldstein, the veteran Supreme Court litigator and founder of SCOTUSblog, who correctly forecast the nomination of Sonia Sotomayor (a nomination that the White House sought his counsel on). But we're going to go out on a limb and make a crazy prediction: President Obama is going to nominate Judge Diane Wood, of the Seventh Circuit, to the Supreme Court. He'll announce the nomination on Monday, May 10

....

Before we get to the "pros" for Obama of nominating Wood, let's address the big "con." The main stumbling block for Judge Wood is her abortion jurisprudence — and the political opposition it would engender. But we don't see this as insurmountable. If Judge Wood gets raked over the coals for her abortion-related rulings by a Republican senator, trying to cast her as a rabid baby killer at her confirmation hearings, [she could reply that she personally chose to have three babies, then say:] "But even though I'm a mother many times over, I recognize that other women might want — or need — to make different choices. Painful choices. And I firmly stand by a woman's right to choose. So did my late boss — the great Justice Harry Blackmun, may he rest in peace — who authored the Court's opinion in *Roe*."

1. Qualifications As has been noted on countless occasions, during her 15 years on the Seventh Circuit, Judge Wood has held her own — and then some — against conservative heavyweights like Chief Judge Frank Easterbrook and Judge Richard Posner. This shows she could go toe-to-toe with Chief Justice Roberts and Justices Scalia, Thomas, and Alito. But Judge Wood isn't in constant combat; she's not abrasive or difficult. Her conservative colleagues are some of her closest friends.

2. Political Considerations Of the top three contenders — Solicitor General Kagan, Judge Garland, and Judge Wood (no offense, Judge Thomas) — Judge Wood would be the most difficult to confirm (primarily because of her abortion rulings, including 8-0 and 8-1 reversals by the Supreme Court). Normally this would weigh against her nomination — but not now, given the political terrain. ¶ The Democrats currently have 59 seats in the Senate. After the midterm elections this fall, this number is going to go down. So President Obama should put his best — i.e., most liberal — foot forward, by nominating Judge Wood. Those 59 Senate seats are like frequent flyer miles: use them now, before they expire. ¶ It's very likely that President Obama will get a third Supreme Court appointment, whether due to the departure from the Court of Justice Ginsburg, who has had health issues, or due to another justice leaving (Justices Scalia and Kennedy both turn 74 this year). At that time, he'll have a much slimmer Democratic majority to work with (assuming the Dems even retain their majority). And that is the time he'd want to have a Kagan or a Garland to put up.

3. Age Of the three top contenders, Judge Wood is the oldest, at 59. Judge Garland is 57, and Kagan just turned 50. Normally this would cut against confirmation, Some of our nation's most influential justices were appointed at older ages, including Oliver Wendell Holmes (61) and Louis Brandeis (59).

4. Gender This is a biggie.

5. Motherhood Judge Wood isn't just a woman; she's a woman with children. As noted supra, playing the "motherhood" card provides some insulation against abortion attacks.

6. Religion If Obama goes with either Garland or Kagan, the Court will be composed of six Catholics and three Jews — in a country that still has a Protestant majority. If he goes with Wood, in contrast, the Protestants would still have at least *some* representation on the high court.

7. Rallying the Base Among the final four, Judge Wood is the definite favorite of progressives.

8. Geography Judge Wood is a Midwesterner — with additional ties to Texas, where she went to school (see infra) — and this is a plus for her. If Obama goes with either Kagan or Garland, the heartland will have absolutely no representation on the Supreme Court.

9. Non-Ivy League Judge Wood, a graduate of the University of Texas (undergrad and law), would break the Ivy League monopoly

10. Sentimental Reasons Judge Wood is sort of like "Justice Stevens 2.0": new and improved, with added gender diversity!

David Lat, SCOTUS Speculation: Could It Be Wood? *Ten reasons Obama might appoint Diane Wood*. (15:03 ET, 5 May 2010)

<http://abovethelaw.com/2010/05/scotus-speculation-could-it-be-wood/> .

I think Lat's second reason ("political considerations") is critically important, because this is Obama's last chance to put a liberal on the Court. On 8 May, the Associated Press said the same thing:

"Based on what he's done so far, it doesn't seem like he is willing to expend a lot of political capital," said Christine Nemacheck, a government professor at the College of William and Mary in Williamsburg, Va. Nemacheck is the author of "Strategic Selection," a book on how presidents choose high court nominees. [¶] With polls showing a drop in Obama's popularity and the prospect for Republican gains in November's elections, Nemacheck said that if the president wants to put a strong liberal on the bench, "Now probably is his best chance."

Mark Sherman, "Age could be a key factor in high court pick," Associated Press (18:58 EDT 8 May 2010)

Wood also has advantages in a proven ability to influence conservatives, and her appointment would bring diversity to the Court (e.g., religion, geography, and non-Ivy League education).

I agree with Lat that Wood's age (59 y) should not disqualify her, but conventional political wisdom prefers a younger candidate (e.g., 50 y)²¹ because they will serve longer on the Court, and propagate the nominating president's values for a longer time. The fallacy in this conventional wisdom is that no one — certainly not the president, who had only a one-hour interview with the candidate — can predict what the Justice's values will be ten or twenty years after appointment.

Judge Diane Wood's opinions are frequently cited by federal judges outside her circuit, which is evidence of the clarity and persuasiveness of her work. A year ago, I cited objective evidence that Diane Wood was one of the top two or three female judges on the U.S. Courts of Appeal, and one of the top ten judges in the U.S. Courts of Appeal.²²

On 7 May, Prof. Jonathan Adler of the Case Western Reserve University School of Law explained why Judge Wood might be easier to confirm than Solicitor General Kagan, although both are confirmable.

.... while most of the buzz surrounds Kagan and, to a lesser extent, Wood. For what it's worth, I remain skeptical that SG Kagan would be easier to confirm than Judge Wood. This is the conventional wisdom, but here is why I think it's wrong.

As an initial matter, I think it is easier to confirm a sitting appellate judge with sterling credentials than an administration insider. Add that the judge is from the midwest while the insider is yet another Ivy Leaguer, and the distinction becomes more stark. Further, polls

²¹ Mark Sherman, "Age could be a key factor in high court pick," Associated Press (18:58 EDT 8 May 2010) ("If Obama nominates Kagan to the high court, her age could be the decisive factor. Kagan is the youngest, by nearly seven years, of the four people the president is known to have interviewed to succeed retiring Justice John Paul Stevens.").

²² Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> at p. 56 (3 Aug 2009).

suggest the public wants a nominee to have some prior judicial experience — and Kagan has none. Indeed, she also had relatively little legal experience outside of academia. This does not mean she's unqualified, but I do think it means she would be easier to oppose — and therefore would be a heavier lift. [Note, however, that I would not oppose confirmation of either SG Kagan or Judge Wood.]

The knock on Judge Wood is that she would be a controversial pick because of a handful of opinions concerning abortion and religious liberty, and perhaps a criminal case or two. These cases confirm what is well-known — that Judge Wood is a liberal judge. But that should hardly be a surprise. It is unthinkable that President Obama would nominate someone who is not reliably liberal on most major issues, particularly abortion. Senate Republicans did not go to the wall to oppose Justice Ginsburg's confirmation over these issues, and they won't with Judge Wood either. Further, any controversy over her judicial opinions would be a "day one" story. That is, Judge Wood would be criticized for these opinions right out of the gate. By the time of her hearings and the vote, however, this story will have become old. Sure there may be 20–30 votes against her over abortion, but I can't see these opinions ever catching fire and causing her a problem. More importantly, with Judge Wood there would be few surprises. There's a reason why Presidents keep drawing Supreme Court nominees from the appellate bench — they are relatively easy to confirm.

....

None of this means that Kagan would not be confirmed. Of course she would — as would Judge Wood (or Judge Garland or Judge Thomas). None of the leading prospects would be successfully opposed. But some nominees would provoke more of a fight than others, and this matters. A nomination fight has political costs. The more time an Administration must spend defending a nominee, distributing new talking points, responding to a new attack or revelation, etc., the less time the Administration has to devote to other things. Combating a constant drip of revelations and information demands is very time-consuming, and will deplete the Administration's ability to devote attention elsewhere. This can be a particular problem if the fight does not energize the base, and liberal commentators seem less excited about the prospects of a Justice Kagan than some of the alternatives. All this means is that a Kagan nomination could be more politically costly than the conventional wisdom suggests, particularly when compared to the leading alternative of Judge Wood.

Jonathan H. Adler, "Closing in on a Court Pick," *Volokh Conspiracy* (18:10, 7 May 2010)

<http://volokh.com/2010/05/07/closing-in-on-a-court-pick/> .

Announcement of Nomination

At approximately 22:00 EDT on Sunday night, 9 May, Pete Williams of NBC News reported that President Obama would nominate Elena Kagan on Monday. I do not cite the webpage at the MSNBC website, because the same URL was used for frequently updated news on the same story during Monday, so the original story has vanished. The Associated Press reported Kagan's selection at 01:20 EDT on 10 May.

At 10:00 EDT on Monday, 10 May, President Obama made his formal announcement of her nomination:

THE PRESIDENT: Hello, hello, hello! Thank you. (Applause.) Thank you very much. Everybody, please have a seat.

Good morning, everybody. Of the many responsibilities accorded to a President by our Constitution, few are more weighty or consequential than that of appointing a Supreme Court justice — particularly one to succeed a giant in the law like Justice John Paul Stevens.

For nearly 35 years, Justice Stevens has stood as an impartial guardian of the law, faithfully applying the core values of our founding to the cases and controversies of our time.

He has done so with restraint and respect for precedent — understanding that a judge's job is to interpret, not make law — but also with fidelity to the constitutional ideal of equal justice for all. He's brought to each case not just mastery of the letter of the law, but a keen understanding of its impact on people's lives. And he has emerged as a consistent voice of reason, helping his colleagues find common ground on some of the most controversial and contentious issues the Court has ever faced.

While we can't presume to replace Justice Stevens' wisdom or experience, I have selected a nominee who I believe embodies that same excellence, independence, integrity, and passion for the law — and who can ultimately provide that same kind of leadership on the Court: our Solicitor General, and my friend, Elena Kagan. (Applause.)

Elena is widely regarded as one of the nation's foremost legal minds. She's an acclaimed legal scholar with a rich understanding of constitutional law. She is a former White House aide with a lifelong commitment to public service and a firm grasp of the nexus and boundaries between our three branches of government. She is a trailblazing leader — the first woman to serve as Dean of Harvard Law School — and one of the most successful and beloved deans in its history. And she is a superb Solicitor General, our nation's chief lawyer representing the American people's interests before the Supreme Court, the first woman in that position as well. And she has won accolades from observers across the ideological spectrum for her well-reasoned arguments and commanding presence.

But Elena is respected and admired not just for her intellect and record of achievement, but also for her temperament — her openness to a broad array of viewpoints; her habit, to borrow a phrase from Justice Stevens, “of understanding before disagreeing”; her fair-mindedness and skill as a consensus-builder.

These traits were particularly evident during her tenure as dean. At a time when many believed that the Harvard faculty had gotten a little one-sided in its viewpoint, she sought to recruit prominent conservative scholars and spur a healthy debate on campus. And she encouraged students from all backgrounds to respectfully exchange ideas and seek common ground — because she believes, as I do, that exposure to a broad array of perspectives is the foundation not just for a sound legal education, but of a successful life in the law.

This appreciation for diverse views may also come in handy as a die-hard Mets fan serving alongside her new colleague-to-be, Yankees fan Justice Sotomayor, who I believe has ordered a pinstriped robe for the occasion. (Laughter.)

But while Elena had a brilliant career in academia, her passion for the law is anything but academic. She has often referred to Supreme Court Justice Thurgood Marshall, for whom she clerked, as her hero. I understand that he reciprocated by calling her “Shorty.” (Laughter.) Nonetheless, she credits him with reminding her that, as she put it, “behind law there are stories — stories of people’s lives as shaped by the law, stories of people’s lives as might be changed by the law...”

That understanding of law, not as an intellectual exercise or words on a page, but as it affects the lives of ordinary people, has animated every step of Elena’s career — including her service as Solicitor General today.

During her time in this office, she’s repeatedly defended the rights of shareholders and ordinary citizens against unscrupulous corporations. Last year, in the *Citizens United* case, she defended bipartisan campaign finance reform against special interests seeking to spend unlimited money to influence our elections. Despite long odds of success, with most legal analysts believing the government was unlikely to prevail in this case, Elena still chose it as her very first case to argue before the Court.

I think that says a great deal not just about Elena’s tenacity, but about her commitment to serving the American people. I think it says a great deal about her commitment to protect our fundamental rights, because in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.

And I think it says a great deal about the path that Elena has chosen. Someone as gifted as Elena could easily have settled into a comfortable life in a corporate law practice. Instead, she chose a life of service — service to her students, service to her country, service to the law and to all those whose lives it shapes.

And given Elena’s upbringing, it’s a choice that probably came naturally. Elena is the granddaughter of immigrants whose mother was, for 20 years, a beloved public schoolteacher — as are her two brothers, who are here today. Her father was a housing lawyer, devoted to the rights of tenants. Both were the first in their families to attend college. And from an early age, they instilled in Elena not just the value of a good education, but the importance of using it to serve others.

As she recalled during her Solicitor General confirmation hearings, “Both my parents wanted me to succeed in my chosen profession. But more than that, both drilled into me the importance of service, character, and integrity.”

Elena has also spoken movingly about how her mother had grown up at a time when women had few opportunities to pursue their ambitions and took great joy in watching her daughter do so.

Neither she, nor Elena’s father, lived to see this day. But I think her mother would relish this moment. I think she would relish — as I do — the prospect of three women taking their seat on the nation’s highest Court for the first time in history. (Applause.) A Court that would be more inclusive, more representative, more reflective of us as a people than ever before.

And I think they would both be tremendously proud of their daughter — a great lawyer, a great teacher, and a devoted public servant who I am confident will make an outstanding Supreme Court justice.

So I hope that the Senate will act in a bipartisan fashion, as they did in confirming Elena to be our Solicitor General last year, and that they will do so as swiftly as possible, so she can get busy and take her seat in time to fully participate in the work of the Court this fall.

With that, I would like to invite the person who I believe will be the next Supreme Court justice of the United States, Elena Kagan, to say a few words. (Applause.)

SOLICITOR GENERAL KAGAN: Thank you, Mr. President. I am honored and I am humbled by this nomination and by the confidence you have shown in me.

During the last year as I have served as Solicitor General, my longstanding appreciation for the Supreme Court's role in our constitutional democracy has become ever deeper and richer. The Court is an extraordinary institution in the work it does and in the work it can do for the American people by advancing the tenets of our Constitution, by upholding the rule of law, and by enabling all Americans, regardless of their background or their beliefs, to get a fair hearing and an equal chance at justice.

And within that extraordinary institution, Justice Stevens has played a particularly distinguished and exemplary role. It is, therefore, a special honor to be nominated to fill his seat.

I have felt blessed to represent the United States before the Supreme Court, to walk into the highest Court in this country when it is deciding its most important cases, cases that have an impact on so many people's lives. And to represent the United States there is the most thrilling and the most humbling task a lawyer can perform.

I've been fortunate to have been supported in all the work I've done as Solicitor General by a remarkable group of lawyers and staff, many of whom are here today. They exemplify professionalism, public service and integrity. And I am grateful for all that they have taught me.

My professional life has been marked by great good fortune. I clerked for a judge, Abner Mikva, who represents the best in public service, and for a Justice, Thurgood Marshall, who did more to promote justice over the course of his legal career than did any lawyer in his lifetime.

I have had the opportunity to serve under two remarkable Presidents who have devoted themselves to lifting the lives of others and to have inspired a great many more to do the same.

I had the privilege of leading one of the world's great law schools and of working there to bring people together and to help ensure that they and the school were making the largest possible contribution to the public good, both in this country and around the world. I am proud of what all of us accomplished there.

And through most of my professional life, I've had the simple joy of teaching — of trying to communicate to students why I so love the law not just because it's challenging and endlessly interesting — although it certainly is that — but because law matters; because it keeps us safe; because it protects our most fundamental rights and freedoms; and because it is the foundation of our democracy.

I'm thankful to my brothers and other family and friends for coming to Washington to be with me here today. And much more, I am thankful for all of their support and loyalty and love, not just on this day but always.

If this day has just a touch of sadness in it for me, it is because my parents aren't here to share it. They were both, as the President said, the children of immigrants and the first in their families to go to college. My father was the kind of lawyer who used his skills and training to represent everyday people and to improve a community. My mother was a proud public schoolteacher, as are my two brothers — the kind of teachers whom students remember for the rest of their lives.

My parents' lives and their memory remind me every day of the impact public service can have, and I pray every day that I live up to the example they set.

Mr. President, I look forward to working with the Senate in the next stage of this process. And I thank you again, Mr. President, for this honor of a lifetime. Thank you so much. (Applause.)

President Obama, "Remarks by the President and Solicitor General Elena Kagan at the Nomination of Solicitor General Elena Kagan to the Supreme Court,"

<http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>
(10:02-17 EDT, 10 May 2010).

my reaction

I am not happy with the propaganda and platitudes in Obama's speech. He asserted: "Elena is widely regarded as one of the nation's foremost legal minds." Widely regarded by whom? Obama doesn't say. Not by judges, who neither cite nor quote her articles. President Obama *could* have mentioned one of Kagan's law review articles, but instead Obama mentioned that Kagan likes the New York Mets baseball team, a bizarre way of discussing a person who is allegedly "one of the nation's foremost legal minds."

If Obama really wanted to nominate "one of the nation's foremost legal minds", he could have picked one of several professors who are authors of widely used treatises or textbooks on constitutional law, but all of those authors (except Kathleen Sullivan) are white males.

During Obama's speech on 10 May, when he first mentioned Kagan's name, he called her "my friend". I think that is a significant choice of words. Obama knew Kagan during 1991-95 when they were on the faculty at the University of Chicago Law School: Obama as a Lecturer and Kagan as an Assistant Professor. See my remarks at page 45, below.

Obama also said: "While we can't presume to replace Justice Stevens' wisdom or experience," Actually, Obama could have done that simply by choosing Judge Posner of the Seventh Circuit, who is arguably the most intellectual judge in the USA. But, as I said above at page 14, Posner is an old white male, and Posner will therefore be overlooked by Obama.

Obama said "Someone as gifted as Elena could easily have settled into a comfortable life in a corporate law practice. Instead, she chose a life of service — service to her students, service to her country, service to the law and to all those whose lives it shapes." Obama says Kagan sacrificed her personal financial worth to engage in public service. While law professors are paid substantially less than senior attorneys in big city law firms, professors can engage in lucrative consulting to earn extra income. And a Dean is paid substantially more than a professor. On 18 May (see page 52, below), it was disclosed that Kagan has a net worth of approximately \$ 1.76 million, so she is wealthy.

Kathleen Sullivan

Obama and his propaganda team continue to tout Kagan's experience as Dean of Harvard Law School (2003-2009). I think experience as Dean is irrelevant to the Supreme Court, because being Dean is essentially a management job. A Justice on the Supreme Court has a staff of four clerks and two secretaries to manage, which does not require a lot of managerial skill. But, *if* experience as Dean is *really* important, why didn't Obama consider Kathleen Sullivan, who was Dean of Stanford University Law School (1999-2004)? Let's compare Sullivan and Kagan:

- My search of Westlaw on 19 May 2010 showed that Kathleen Sullivan is listed as an attorney on 56 briefs filed in the U.S. Courts of Appeals, while Elena Kagan is listed on 1 brief. Above, at page 27, I commented on Kagan's lack of litigation experience.
- My search of Westlaw on 19 May 2010 showed that Kathleen Sullivan is listed as an attorney on 20 briefs filed in the U.S. Supreme Court (Sullivan's first brief was in the year 1984), while Elena Kagan is listed on 13 briefs (Kagan's first brief was in the year 2009).
- Sullivan has been a member of the U.S. Supreme Court bar since 1985 and argued five cases there. Kagan was first admitted to practice at the U.S. Supreme Court bar in 2009 and she argued six cases there, all in her one-year role as U.S. Solicitor General. Five vs. six cases is not a significant difference.
- Sullivan has written a book on constitutional law; Kagan has never written a book.
- My search of law reviews and legal journals in Westlaw on 18 May 2010 found 56 items written by Kathleen Sullivan, and 12 items written by Kagan. (Of Kagan's dozen, only five are scholarly articles, the remainder are tributes to a famous professor or judge, introduction to a symposium, book review, etc.) Sullivan graduated from law school in 1981, Kagan in 1986, so Sullivan would be expected to have 1.2 times more publications than Kagan due to their different ages, but Sullivan actually has at least 4.7 times more publications than Kagan.

Despite Sullivan's superior credentials to Kagan, Sullivan did not make anyone's list of top ten candidates considered by Obama in 2010.

Reaction to Kagan's Nomination: 10-16 May

Monday morning, 10 May 2010, was a time of glory for Elena Kagan. But the criticism of her began almost immediately.

Both *The New York Times* and *The Washington Post* published articles containing criticism from Republicans (e.g., Kagan has never been a judge, fears that Kagan is too liberal, disgust at Kagan barring military recruiters from Harvard Law School) and criticism from Democrats (e.g., fears that Kagan is too conservative).²³

Prof. Ilya Somin of George Mason University School of Law, wrote in the blog at the Volokh Conspiracy:

I don't think that Kagan is the best-qualified possible nominee. Very few Supreme Court nominees are, since (to understate the point) it is not a purely merit-based process. But she does have at least the minimum necessary credentials.

Ilya Somin, "Preliminary Reflections on the Kagan Nomination," (02:36, 10 May 2010)

<http://volokh.com/2010/05/10/preliminary-reflections-on-the-kagan-nomination/> .

I believe Prof. Somin has the correct perspective here. Kagan is at least minimally qualified, but *not* the best candidate.

ordinary people and automobiles

On 10 May, President Obama spoke of his desire to have a nominee who understands law "as it affects the lives of ordinary people".

Obama promised judges with at least a passing knowledge of the "real world," but Kagan's experience draws from a world whose signposts are distant from most Americans: Manhattan's Upper West side, Princeton University, Harvard Law School and the upper reaches of the Democratic legal establishment.

Ben Smith, "Is Kagan from the 'real world'?" *Politico*

<http://www.politico.com/news/stories/0510/37046.html> (04:54 ET, 11 May 2010). I want the U.S. Supreme Court to be an elite intellectual institution, so I am pleased that the President did not nominate an average lawyer to the Court. Anyone who I think belongs on the Supreme Court has little in common with ordinary americans.

²³ Peter Baker, "Kagan Nomination Leaves Longing on the Left," *The New York Times*, <http://www.nytimes.com/2010/05/11/us/politics/11nominees.html> (10 May 2010); Anne E. Kornblut and Robert Barnes, "Kagan would emphasize Supreme Court moving in new direction," *The Washington Post*, p. A7 <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/10/AR2010051001116.html> (11 May 2010).

On the morning of 10 May, *The Washington Post* reported:

Kagan was educated at Princeton, Oxford and Harvard Law, and is such a product of New York City that she did not learn to drive until her late 20s. According to her friend John Q. Barrett, a law professor at St. John's University, it is a skill she has not yet mastered. [9] She has never married and has no children.

Robert Barnes, "Elena Kagan: '10th justice' has deep legal knowledge but no bench experience." *The Washington Post*, (07:16 EDT, 10 May 2010)

<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/10/AR2010051001033.html>

Ed Whalen, a conservative legal commentator, wrote about Kagan:

In addition to her kicking military recruiters off Harvard's campus during wartime and being paid for a comfy position on a Goldman Sachs advisory board, this passage (from this article) nicely captures Elena Kagan's remoteness from the lives of most Americans:

Kagan ... is such a product of New York City that she did not learn to drive until her late 20s. According to her friend John Q. Barrett, a law professor at St. John's University, it is a skill she has not yet mastered.

Ed Whalen, "Not the NASCAR Justice," *National Review Online*,

<http://www.nationalreview.com/bench-memos/49022/not-nascar-justice/ed-whelan>

(08:06 EDT, 10 May 2010).

Although some liberals castigated Whalen for his comment, the quoted passage about her driving actually comes from *The Washington Post*. So, fifty-year old Kagan's life is summed up in two thoughts: (1) she is so *unamerican* <grin> that she waited "until her late 20s" to learn to drive a car, and (2) I have this image — after reading what Barrett said about Kagan in *The Washington Post* — that Kagan drives like a maniac, scattering pedestrians in Harvard Square. <grin>

The New York Times continues the description of Kagan's adventures with automobiles:

And she was intense, so much so that life's mundane tasks would sometimes slip her mind. The native New Yorker Ms. Kagan was never a very good driver. "A couple of times when she was so focused on her work, she would park her car and leave it running overnight," said Lawrence Lessig, a longtime friend who taught alongside Ms. Kagan in Chicago. "She just forgot to turn it off."

Sheryl Gay Stolberg, Katharine Q. Seelye and Lisa W. Foderaro, "A Pragmatic New Yorker on a Careful Path to Washington," *The New York Times*,

<http://www.nytimes.com/2010/05/11/us/politics/11kagan.html> (10 May 2010). I can imagine the testimony by the car thief who stole her car, as the thief blames Kagan for leaving the keys in the ignition. <laughing>

The automobile occurs again in another news report:

[Republicans] are also carping about her New Yorkiness — she did not learn to drive a car until her late 20s — and her supposed isolation from the lives of ordinary Americans. John Cornyn, a Republican senator from Texas, grouched that she has "spent her entire professional career in Harvard Square, Hyde Park [the posh Chicago neighbourhood where Mr Obama also lived] and the DC Beltway."

anonymous, "Cracking the Kagan code," *The Economist*, (13 May 2010).

Kagan grew up in New York City, which has the best mass-transit system in the USA, and where a car is both unnecessary and a liability (i.e., parking and automobile insurance are both very expensive). Similarly, a car is not necessary at either Princeton University or Harvard University, because everything one needs is within walking distance. So it is not surprising that Kagan deferred learning to drive until she lived someplace where she needed an automobile.

Althouse

Professor Ann Althouse of the University of Wisconsin Law School wrote on 10 May:

Today, I listened again to Elena Kagan's oral argument in *Citizens United v. FEC*. I was just trying to get a feeling for the quality of her mind, and I was struck by how badly it went. I dug up a Salon article from a few weeks ago: "On the Supreme Court, not a lot of respect for Elena Kagan: The solicitor general's appearances before the high court have been marked by unusually brusque treatment" by James Doty. He looked to her 5 oral arguments as SG as evidence of "whether Kagan would be an effective liberal on the court," what sort of power she might have over Anthony Kennedy, whose vote tends to determine outcomes as he shifts from the Court's liberal 4 to the conservative 4, and whether she could provide an effective counterweight to the Court's strong conservatives.

....

It seems that Kagan has been very good at influencing professors and that Obama read that (and his own direct contact with her) to mean that she'll be good at influencing Supreme Court Justices. That may be a poor inference. I think a law school dean is engaged in more of a social enterprise in bringing groups of people together. But the Justices — as the oral argument shows — deal in much more technical legal arguments. They may bend liberal or conservative, but the arguments need to be there. Justice Kennedy isn't there to be sweet-talked and smiled at. He's quite serious in mulling over the details.

Ann Althouse, "How good will Elena Kagan be at influencing the other Justices on the Supreme Court?" <http://althouse.blogspot.com/2010/05/how-good-will-elena-kagan-be-at.html> (19:49, 10 May 2010).

Republicans

On Monday afternoon, 10 May, Senator Inhofe, a Republican from Oklahoma, announced he would vote against Kagan's confirmation. Here is Inhofe's entire press release:

"As with her nomination to serve as Solicitor General, I remain concerned about Elena Kagan's record," Inhofe said. "Now as a nominee to the Supreme Court, her lack of judicial experience and her interpretation of the Constitution also play an important role in my decision to once again oppose her nomination. The position for which she has been nominated has lifetime tenure, and it is concerning that the President has placed such trust in a nominee that has not been properly vetted through a judicial career, having worked mostly in academia and never before as a judge.

“While her service as the Dean of Harvard Law School is an impressive credential, decisions she made in that role demonstrated poor judgment. While there, she banned the U.S. military from recruiting on campus, an issue very important to me. She took the issue even further when she joined with other law school officials in a lawsuit to overturn the Solomon amendment, which was adopted by Congress to ensure that schools could not deny military recruiters access to college campuses. Claiming the Solomon Amendment was ‘immoral,’ she filed an amicus brief with the Supreme Court in *Rumsfeld v. F.A.I.R* opposing the Amendment. The Court unanimously ruled against her position and affirmed that the Solomon Amendment was constitutional.

“I am also concerned about the seeming contempt she has demonstrated in her comments about the Senate confirmation process as well as her lack of impartiality when it comes to those who disagree with her position.”

Jim Inhofe, “Inhofe Opposes Kagan to Supreme Court,” <http://inhofe.senate.gov/> (10 May 2010). Senator Inhofe reminds me of the student who persistently is the first in the class to obtain the wrong answer to a math problem.

Republicans are bashing Kagan for her lack of judicial experience. I prefer a nominee like Judge Wood who has not only judicial experience, but also whose opinions are frequently cited by other judges outside her circuit, so I agree with this criticism of Kagan. But wait! President Clinton nominated Kagan to the U.S. Court of Appeals for the District of Columbia in June 1999. Republicans prevented Kagan from becoming a judge, by failing to hold hearings on her nomination. So whose fault is it that Kagan lacks judicial experience? Republicans! <laughing> I have not seen this argument in any newspaper or website, but it makes sense to me.²⁴

abortion

Probably as a result of Kagan’s weak public record on abortion, NARAL [National Abortion Rights Action League] Pro-Choice America did *not* endorse Kagan on Monday, 10 May:

.... We call on the Senate to give Solicitor General Kagan a fair hearing and look forward to learning more about her views on the right to privacy and the landmark *Roe v. Wade* decision. President Obama recently reiterated his strong support for constitutional principles that protect women's rights. We will work to ensure Americans receive clear answers to questions regarding these principles as this nomination process moves forward.

Statement of Nancy Keenan, President of NARAL Pro-Choice America, on the Nomination of Solicitor General Elena Kagan to the U.S. Supreme Court, http://www.prochoiceamerica.org/news/press-releases/2010/pr05102010_scotusnomkagan.html (10 May 2010).

²⁴ Senator Leahy mentioned this argument during the vote in the Judiciary Committee on 20 July. Josh Gerstein, “Senate panel clears way for Kagan,” *Politico*, (18:55 EDT, 20 July 2010).

At 18:07 EDT on Monday, the Associated Press reported that a journalist had looked in President Clinton's archives in Arkansas and discovered a memo written by Kagan on 13 May 1997 that advocated a ban on late-term abortions, except when the health of the mother was at risk.²⁵ That memo surely upset pro-choice feminists and liberals in general.

This lack of endorsement by NARAL was noted by Christi Parsons and James Oliphant, "Kagan's abortion stance has both sides guessing," *Los Angeles Times*, <http://www.latimes.com/news/nationworld/nation/la-na-kagan-abortion-20100516,0,1338436.story> (15:41 PDT, 15 May 2010) ("NARAL Pro-Choice America, for example, has reserved its endorsement until its leaders learn more.").

On Tuesday, 18 May, a pro-choice congresswoman finally noticed Kagan's memo:

A senior House Democrat says senators should fully question Supreme Court nominee Elena Kagan to make sure she supports abortion rights. New York Rep. Louise Slaughter leads the House Pro-Choice Caucus. Slaughter views as "troubling" — her word — a 1997 memo Kagan wrote urging then-President Bill Clinton to back a ban on late-term abortions. Slaughter wrote to Senate Judiciary Committee Chairman Patrick Leahy and the panel's ranking Republican, Sen. Jeff Sessions of Alabama, on Tuesday. Julie Hirschfeld Davis, "Democrat calls Kagan abortion memo 'troubling'," Associated Press (17:03 EDT, 18 May 2010).

On 12 June, Howe & Russell (a law firm in Bethesda, Maryland) released a nine-page briefing paper about Kagan's views on abortion.

Elena Kagan's record on abortion is thin. She has never publicly written or spoken about her own views on the question — whether as a constitutional or ethical matter. She has never given any indication that she regards abortion as an issue in which she is personally invested. http://www.scotusblog.com/wp-content/uploads/2010/06/Kagan-issues_abortion-June-141.pdf

Goldstein

On Wednesday night, 12 May, Tom Goldstein at SCOTUSblog wrote some interesting comments about Kagan:

Three days into the nomination, not much has changed. No Democrat has opposed Elena Kagan; no Republican has endorsed her. No Senator or serious commentator has suggested that she won't be confirmed, or that the nomination should or would be filibustered. [¶] In an effort to break through the mass of coverage, I did want to highlight three points that have gotten some attention, but less than they deserve, because they have the chance to shift the dynamic of the nomination.

....

²⁵ Jill Zeman Bleed, "Kagan in '97 urged Clinton restrict late abortions," The Associated Press (18:07 EDT, 10 May 2010).

First, as Nina Totenberg first reported, Kagan signed this letter in 2005 strongly protesting Lindsay Graham's amendment to limit the Guantanamo Bay detainees' access to federal courts. This is far more direct evidence of Kagan's views on executive powers in foreign affairs than the isolated statement in her confirmation hearings that has been invoked as supposedly showing her support for Bush-era policies. The letter should assuage liberal opponents, but raises the question whether Graham and other moderate Republicans may vote against her.

Second, as the New York Times reported, Miguel Estrada unambiguously endorsed Kagan's confirmation. Estrada is a hero of conservatives, given his treatment when he was nominated by President Bush to the D.C. Circuit. The endorsement gives Democrats and the White House ammunition to argue that Republicans are simply playing politics.

Third, as Jim Oliphant reported, Kagan signed a memo while working in the White House stating that President should sign an assault weapons ban. And as Greg Stohr of Bloomberg has reported, while clerking for Thurgood Marshall, Kagan wrote that she was "not sympathetic" to the claim that the District of Columbia's handgun ban violates the Second Amendment; that is the claim the Supreme Court accepted in the *Heller* case. Both statements by Kagan reflected the position of her employers – the White House and Justice Marshall – and her brief statement as a law clerk about the Second Amendment claim (literally a single short sentence) represented the view of every court of appeals. But those statements will almost certainly be enough to cause the NRA, with its considerable influence, to formally oppose the nomination.

Tom Goldstein, "Overlooked points in the coverage of the Kagan nomination,"

<http://www.scotusblog.com/2010/05/overlooked-points-in-the-coverage-of-the-kagan-nomination/> (22:02 EDT, 12 May 2010). Strangely, Goldstein omitted mention of Kagan's opposition to late-term abortion, in a memo discovered on 10 May.

meet and greet

On Wednesday, 12 May, Kagan began 30-minute "meet and greet" sessions with individual Senators. *The Washington Post* reported:

Democrats, while nearly all likely to back her when the hearings are over, are politely jabbing Kagan for her 1995 article casting the confirmation process as a "vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis."

Back then, Kagan called for a more direct discussion of nominees' views on specific legal issues, an approach the recent appointees of both President George W. Bush and Obama have eschewed.

"I asked her about it, and I said, 'You know, you're going to have to live by the Kagan standard,' which you established," said Sen. Richard Durbin (D-Ill.), a member of the Judiciary Committee who met with Kagan Wednesday. "She said, 'Well, the world looks a little different from this vantage point.'"

Perry Bacon, Jr. "Kagan likely to face 2 lines of questioning in second day with senators," *The Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/13/AR2010051301125.html> (12:22 EDT, 13 May 2010). The quote from Senator Durbin is also mentioned by Sheryl Gay Stolberg, "On Capitol Hill, Kagan Gets to Know Her Voters," *The New York Times*, <http://www.nytimes.com/2010/05/13/us/politics/13kagan.html> (12 May 2010).

But, in her interview with Senator Specter, Kagan promised to answer specific questions on controversial subjects. The Associated Press reported:

Democratic Senator Arlen Specter is calling Supreme Court nominee Elena Kagan "very forthcoming." The Pennsylvanian voted against confirming Kagan to her current post as solicitor general because he said she should have answered more questions about how she'd approach cases. Specter says Kagan told him she stood by her past criticism of the Supreme Court confirmation process, and her description of it as a "charade" in which nominees stonewall questions.

Julie Hirschfeld Davis, "Specter, a former foe, calls Kagan 'forthcoming'," Associated Press (11:06 EDT, 13 May 2010). Specter probably voted against Kagan's confirmation to Solicitor General in 2009 because Specter was a Republican then. Specter *could* have said he made a mistake in 2009 to oppose Kagan. *Politico* reported the same remarks by Specter that Kagan continues to believe nominees should not stonewall Senators. Manu Raju, "Arlen Specter softens on Elena Kagan," <http://www.politico.com/news/stories/0510/37191.html> (11:55 EDT, 13 May 2010). The last nominee to the Supreme Court who answered questions about his views on controversial issues was Robert Bork, who was *not* confirmed by the Senate.

My searches of Google News found that neither journalists nor commentators noticed this difference — if not contradiction — in Kagan's remarks to Senators Durbin and Specter.

On Monday, 17 May, Kagan sent a letter to the Clerk of the U.S. Supreme Court, making her deputy the acting Solicitor General, effective retroactively to 10 May.

know influential people

David Brooks wrote an op-ed article in *The New York Times* on 10 May:

About a decade ago, one began to notice a profusion of Organization Kids at elite college campuses. These were bright students who had been formed by the meritocratic system placed in front of them. They had great grades, perfect teacher recommendations, broad extracurricular interests, admirable self-confidence and winning personalities.

If they had any flaw, it was that they often had a professional and strategic attitude toward life. They were not intellectual risk-takers. They regarded professors as bosses to be pleased rather than authorities to be challenged. As one admissions director told me at the time, they were prudential rather than poetic.

If you listen to people talk about Elena Kagan, it is striking how closely their descriptions hew to this personality type.

Kagan has many friends along the Acela corridor, thanks to her time at Hunter College High School, Princeton, Harvard and in Democratic administrations. So far, I haven't met anybody who is not an admirer. She is apparently smart, deft and friendly. She was a superb teacher. She has the ability to process many points of view and to mediate between different factions.

Yet she also is apparently prudential, deliberate and cautious. She does not seem to be one who leaps into a fray when the consequences might be unpredictable.

Tom Goldstein, the publisher of the highly influential SCOTUSblog, has described Kagan as “extraordinarily — almost artistically — careful. I don’t know anyone who has had a conversation with her in which she expressed a personal conviction on a question of constitutional law in the past decade.”

....

She has become a legal scholar without the interest scholars normally have in the contest of ideas. She’s shown relatively little interest in coming up with new theories or influencing public debate. [¶] Her publication record is scant and carefully nonideological. She has published five scholarly review articles, mostly on administrative law and the First Amendment. These articles were mostly on technical and procedural issues.

One scans her public speeches looking for a strong opinion, and one comes up empty. [¶] [¶] What we have is a person whose career has dovetailed with the incentives presented by the confirmation system, a system that punishes creativity and rewards caginess.

....

There’s about to be a backlash against the Ivy League lock on the court. I have to confess my first impression of Kagan is a lot like my first impression of many Organization Kids. She seems to be smart, impressive and honest — and in her willingness to suppress so much of her mind for the sake of her career, kind of disturbing.

David Brooks, “What It Takes,” *The New York Times*,

<http://www.nytimes.com/2010/05/11/opinion/11brooks.html> (10 May 2010).

Howard Kurtz of *The Washington Post* wrote on 12 May:

Elena Kagan knows the right people, and it’s paying off. [¶] First and foremost, of course, she had the good fortune to be teaching law at the University of Chicago at the same time as Barack Obama.

She is firmly plugged into the Beltway-to-Boston elite — the upper crust of the media, academia, law and politics — in ways that create a presumption of excellence and lots of favorable profiles. It means there are big-name law professors who can be trotted out to vouch for her brilliance, and political operatives who touted her as the front-runner all along.

....

David Brooks (University of Chicago²⁶) sees a monomaniacal focus:
[quotation from original source, above]

....

Andrew Sullivan [http://andrewsullivan.theatlantic.com/the_daily_dish/2010/05/the-purity-of-her-careerism.html (11:49, 11 May)] returns a similar indictment, but with added disgust:

"Her life, so far as one can tell, is her career, and her career has been built by avoiding any tough or difficult political or moral positions, eschewing any rigorous intellectual debate in which she takes a clear stand one way or the other, pleasing

²⁶ Note added by Standler: Brooks received a Bachelor’s degree from the University of Chicago in 1983 and he is currently a professional journalist.

every single authority figure she has encountered, and reveling in the approval of the First Class Car Acela Corridor elite. . . .

"Name one risk she has taken with her career. I can't. . . .

"It's all so comfy, isn't it? Those poker parties. Those committee meetings. No wonder Jeffrey Rosen and Jeffrey Toobin validate her. But at least they have offered an opinion or two from time to time on issues every thinking person would discuss. She hasn't."

Howard Kurtz, "Kagan boosted by her buddies," *The Washington Post*,

<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051201467.html>

(09:06 EDT, 12 May 2010).

On Sunday, 16 May, the *San Francisco Chronicle* published an article that suggested that Kagan's personal experience of working in the White House for Bill Clinton, and later Barack Obama, was more important than her credentials.

Washington, we've got a problem. Does anyone really think a young law school administrator, with little courtroom and no judicial experience, is the best possible candidate for a lifetime appointment to the U.S. Supreme Court? Unfortunately that's what we get when selecting a stealth candidate who can survive the confirmation process trumps nominating a seasoned expert who will excel on the bench.

President Obama's nomination of Elena Kagan to replace Justice John Paul Stevens is frustrating on several levels. The first Supreme Court nominee in nearly four decades with no judicial experience, Kagan has argued only six court cases, spending her career instead inside the ivy-covered walls of academe and the power corridors of Washington. While Kagan would increase the gender diversity of the court, she diminishes diversity in almost every other respect.

David Davenport, "Kagan nomination shows process trumps experience," *San Francisco Chronicle*, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/05/15/IN1F1DDU84.DTL>

(16 May 2010). Davenport laments that the court will lose: religious diversity (i.e., no Protestants), academic diversity (i.e., all graduates of Ivy League Law Schools), geographic diversity (i.e., three Justices from New York City, only one Justice from outside the northeastern USA), and no military veterans amongst the Justices. I agree completely with Davenport, which is why I hoped that Obama would nominate Judge Diane Wood.

The way to be nominated to the federal judiciary is to personally know the President, or to personally know someone who has influence with the President. For example,

- Gov. John Sununu appointed Souter to the New Hampshire Supreme Court in 1983. Later, when Sununu was chief of staff for President George H. W. Bush, Sununu recommended that Bush nominate Souter to the U.S. Court of Appeals in Jan 1990 and to the U.S. Supreme Court in July 1990.
- In Oct 2005, President George W. Bush nominated his personal attorney, Harriet Miers, to the U.S. Supreme Court. Miers withdrew her name about one month later.

- President Obama knew Kagan during 1991-95 when they were on the faculty at the University of Chicago Law School: Obama as a Lecturer and Kagan as an Assistant Professor.

Beginning Confirmation Process: 15 May to 27 June

Kagan's theses

On Monday, 17 May, *Politico* reported:

The White House says it soon will release two theses Supreme Court nominee Elena Kagan wrote while attending Princeton and Oxford — ending a game of cat-and-mouse that erupted on the Web after Princeton asked a conservative website to remove her thesis for copyright reasons.

Some conservative critics contend that Kagan's 1981 Princeton thesis — called “To the Final Conflict: Socialism in New York City, 1900-1933” — shows Kagan's allegiance to, or at the very least her affinity for radicalism, a notion Kagan's supporters reject.

Conservative website RedState.com posted the thesis, but on Friday a Princeton archivist, Daniel Linke, e-mailed Red State, asking that the full text of the thesis be removed from the site, citing copyright laws. Red State subsequently removed the full text, but other sites quickly reposted it.

Now the White House says it will release the 130-page Princeton thesis, as well as one Kagan wrote at Oxford on the exclusionary rule, which regards illegally seized evidence. Mike Allen & Josh Gerstein, “White House to release Kagan theses,” *Politico*, <http://www.politico.com/news/stories/0510/37343.html> (11:22 EDT, 17 May 2010).

While it was nice of Princeton University to attempt to enforce the copyright, the copyright belongs to the author, Kagan, not to the University. Strangely, long documents written on Kagan's *unpaid* time — documents that are her personal property, she owns the copyright — are tossed into the public domain during the confirmation process. President Obama has received millions of dollars in royalties for books he wrote, why shouldn't Kagan be paid royalties by people who want to read her theses?

I find it a bit silly that anyone thinks the content of a senior thesis written by a 21 y old history major is indicative of the current — and future — opinions of a 50 y old lawyer. Her master's thesis, written when she was 23 y old, might be slightly more relevant, because it is on a legal topic, the exclusionary rule. But she wrote her master's thesis *before* she attended law school, and her legal education may have changed her view of the exclusionary rule. Of course, all of this reading of old theses has one goal: to find something out of the mainstream, that would embarrass the author. But the whole point of good scholarship is to find some new way of looking at an old problem, to challenge conventional wisdom. The quest for embarrassing material in publications effectively eliminates true intellectuals, with a record of producing significant scholarly work on controversial topics.

Prof. Jack Balkin of Yale Law School wrote a clear and honest assessment of the obsession of politicians (and the news media) with reading *everything* that a Supreme Court nominee ever wrote, including works written during their undergraduate education:

The quest for a "paper trail" for judicial nominees is often not a serious attempt to understand a candidate's thinking. It is rather a way of uncovering information that can be used against a candidate or a means of criticizing or embarrassing the nominating Administration. Proactively, it is a method of preventing many talented individuals even from being considered for judicial appointments because they have written provocative or controversial things in the past. In so doing, it greatly narrows the field of talent for federal judgeships and creates a host of perverse incentives.

Both media and political operatives, who exist in a co-dependent relationship, now treat all Supreme Court appointments in the same way they do scandals. I do not mean that appointments are scandalous. What I mean is that media and political operatives use the same set of techniques of obsessive reporting and commentary for Supreme Court appointments that are characteristic of the coverage of political scandals and disaster stories. It is no accident that coverage of a modern Supreme Court appointment is eerily similar to the coverage of a political scandal (or, for that matter, a child trapped in a well). Newspapers obsessively look for different angles to report the story in ever new ways; commentators and political operatives seek dominant, easy to understand narratives that can be used to frame the situation for public consumption; everyone who knows or claims to ever have known the candidate is dredged up for interviews, while every scrap of paper directly or indirectly connected with the candidate is sorted through, dissected, and analyzed for its larger meaning. It is like reading the entrails of a goose, and just about as valuable.

The coverage of Supreme Court appointments as scandals inevitably leads presidents to choose candidates who have said and written nothing important or controversial, but this does little to ameliorate the situation. To the contrary, it merely exacerbates the problem. Media commentators then naturally ask: What exactly does the candidate or the Administration have to hide? ...

Lest I be misunderstood, I do not think that simply nominating candidates who have openly addressed controversial subjects will solve the problem by itself. The causes of the problem are multiple: the polarization of the parties, the importance of Supreme Court appointments to the most ideological elements of each party's base, the deep interconnections between media and politicians and political operatives, the success of previous scandals in bringing down opponents, and the pathological development of contemporary media coverage, which assimilates all important events to the model of scandals and disasters. Yet even if there is no easy solution, it is worth pointing out the ridiculousness of the situation we have created.

Jack M. Balkin, "Toilet Paper Trails, or the Supreme Court Appointment as Scandal,"

<http://balkin.blogspot.com/2010/05/toilet-paper-trails-or-supreme-court.html>

(09:34, 18 May 2010).

On Tuesday night, 18 May, *The Washington Post* reported:

As an Oxford University graduate student a quarter-century ago, Supreme Court nominee Elena Kagan wrote, "No court should make or justify its decisions solely by reference to the demands of social justice," contending that rulings "should appeal no less to our intellectual than to our ethical sense."

Her masters thesis, an examination of a slice of Supreme Court history submitted a week before her 23rd birthday, was critical of the court in a liberal era under Chief Justice Earl Warren. During that time, she wrote, the court expanded constitutional rights relating to criminal evidence without providing "a coherent theory" to support its work, and left its precedents vulnerable to being "emasculated" later by more conservative members.

....

The documents include the thesis Kagan wrote in 1983 during two years she spent at Oxford University between graduating from Princeton and enrolling at Harvard Law School. Her subject was the Supreme Court's treatment of the exclusionary rule under the Fourth Amendment, a rule that requires courts to forbid the use of evidence seized through unconstitutional means. In criticizing the Warren court of the 1950s and 1960s, she wrote that the justices who expanded the application of the rule during that time "unwittingly did almost everything in their power to assure the rule's eventual demise" because of "their total concentration upon end results."

In her thesis, Kagan wrote: "U.S. Supreme Court Justices live in the knowledge that they have the authority either to command or to block great social, political and economic change. At times, the temptation to wield this power becomes irresistible. The justices, at such times, will attempt to steer the law in order to achieve certain ends and advance certain values. In following this path, the justices are likely to forget both that they are judges and that their Court is a court."

She argued that the Warren court extended the exclusionary rule from federal courts to state courts without providing "a stabled, principled underpinning." As a result, she wrote, the expansive interpretation was vulnerable to revisions by the more conservative court that came next, under Chief Justice Warren E. Burger. "Because the Warren Court did not adequately support the exclusionary rule," she wrote in the thesis's final pages, "the Burger Court has been able slowly to strangle it."

Amy Goldstein and Robert Barnes, "Kagan releases cartons of documents to Senate Judiciary Committee," *The Washington Post*,

<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/18/AR2010051806069.html>
(23:08 EDT, 18 May 2010).

documents from Clinton library

On Saturday, 15 May, the Associated Press reported White House counsel Bob Bauer asked Bill Clinton's presidential library to speed the release of more than 160,000 pages of paper, including e-mail, in its possession from Supreme Court nominee Elena Kagan's tenure as a Clinton adviser in the 1990s.

....

Bauer requested records from her service as an associate counsel, approximately 30,000 pages; records from her service as a domestic policy adviser, approximately 50,000 pages; and records related to her nomination to the U.S. Court of Appeals for the District of Columbia Circuit. The Senate never acted on that nomination. Bauer also requested all e-mail Kagan sent and received, approximately 79,000 pages.

Darlene Superville, "WH asks Clinton library to release Kagan papers," Associated Press (15 May 2010).

On 20 May 2010, the librarian squawked about the demand for 160,000 pages of documents to be provided *before* hearings begin on 28 June 2010:

But Terri Garner, director of the William J. Clinton Presidential Library and Museum, said in an interview Wednesday that it would be "very difficult" for her facility to meet the deadline. She said the records request is overly broad and "too general in scope" and that, under the Presidential Records Act, attorneys for both Clinton and President Obama have the right to read and review each document before it is released to the committee. [¶] "There are just too many things here," she said. "These are legal documents and they are presidential records, and they have to be read by an archivist and vetted for any legal restrictions. And they have to be read line by line."

Kagan, currently U.S. solicitor general, served in the Clinton White House as an associate counsel to the president in 1995 and 1996 and as deputy assistant for domestic policy from 1997 to 1999.

Richard A. Serrano, "Senate panel asks Clinton library to turn over documents on Elena Kagan," *Los Angeles Times*, (20 May 2010)

<http://www.latimes.com/news/nationworld/nation/la-na-kagan-schedule-20100520,0,7114784.story> .

The Wall Street Journal reported that managers at the National Archives in Washington DC seem not to appreciate the difficulty faced by workers at the Presidential Library in Little Rock, Arkansas.

The Obama White House has said it wants material released as quickly as possible. But the former president [Clinton] also can block material, and it's not clear how aggressively he and his representatives will use that authority. Spokesmen for Clinton did not respond to requests for comment.

....

The files of Chief Justice John Roberts, a former Reagan administration attorney who was nominated to the Supreme Court by President George W. Bush, contained about 70,000 pages. And that seemed like a lot. The Kagan papers are more than twice as voluminous [sic], partly because she worked in the age of email and every message is archived."

Laura Meckler, "Trove or Trouble? 168,000 Pages of Kagan," *The Wall Street Journal*, <http://blogs.wsj.com/washwire/2010/05/20/trove-or-trouble-168000-pages-of-kagan/> (19:16 EDT, 20 May 2010).

Senators have requested approximately 160,000 pages of documents that Kagan wrote while working in President Clinton's administration. Suppose it takes three minutes to read and understand one page, then it will take 8000 hours (133 weeks at 60 hours/week) for one person to review the documents. If one demands this task be completed in five weeks at 60 hours/week, one needs a team of 27 people from *each* of the five organizations — the archives, lawyers for Obama, lawyers for Clinton, Senate Republicans, Senate Democrats, or a total of 135 people. How much will it cost to review this material? Assume each page is read by an archivist who is paid

\$30/hour, one attorney for former President Clinton at \$200/hour, one attorney for President Obama at \$200/hour, and two Senate staff members at a total of \$60/hour, the total cost will be approximately \$ 4 million. Is this a good use of the taxpayers' money, given that her confirmation is guaranteed by the Democrats having a strong majority (59 votes) in the Senate?

It's simply astounding how politicians will demand large amounts of documents, which they will never read, in an *attempt* to appear through (and possibly in an attempt to delay Kagan's confirmation). Another back-of-envelope calculation will show the *unreasonableness* of this request: a photocopy machine that copies 30 pages/minute will take 89 hours of continuous operation to make one copy of 160,000 pages. The process will be slower if staples need to be removed and replaced, documents inserted in folders, etc.

On Friday, 21 May, it was announced that President Obama decided *not* to assert executive privilege over the White House files from the 1990s.

The nation's official government record-keeper told senators Friday that President Barack Obama won't try to block the release of documents from Supreme Court nominee Elena Kagan's work in the Clinton White House.

The staff of the National Archives and Records Administration has begun combing through tens of millions of papers and e-mails at Bill Clinton's presidential library in Little Rock to find the relevant files, and plans to start turning them over to the Senate Judiciary Committee on June 4, according to Archivist David S. Ferriero.

In a letter to Sen. Patrick Leahy, D-Vt., the committee's chairman, and Sen. Jeff Sessions of Alabama, its top Republican, Ferriero said Obama doesn't plan to assert executive privilege over the files. Leahy and Sessions wrote to the Clinton library Tuesday [18 May] asking for documents from Kagan's years as a White House counsel and domestic policy adviser to Bill Clinton.

Julie Hirschfeld Davis, "Archivist: Obama won't block Kagan file release," Associated Press, (18:40 EDT, 21 May 2010).

On 1 June, it was announced that ex-President Clinton has an agent reviewing documents before they are released to the Senate and to the public.

The White House may have to negotiate with former President Bill Clinton and a Senate committee to resolve potential confidentiality concerns about releasing files from Supreme Court nominee Elena Kagan's past, [White House Counsel Bob Bauer] told [Sen. Jeff Sessions] Tuesday [1 June].

....

In his letter Tuesday [1 June], Bauer said Obama does not intend to block the release of any of the documents, but noted that Clinton "also has an interest in these records." [¶] Clinton has refused to say whether he plans to claim executive privilege or otherwise place limits on public access to the files.

Julie Hirschfeld Davis, "Clinton representative reviewing Kagan documents," Associated Press, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/01/AR2010060104136.html> (22:16 EDT 1 June 2010).

On Friday, 4 June, The National Archives posted 46,500 pages of Kagan documents from the Clinton Library on its website at <http://www.archives.gov/news/elena-kagan/> .

Commenting on the initial batch of documents released by the Clinton library, one reporter noted it was difficult to see Kagan's personal opinions in the documents:

The 46,500 pages of memos, clippings and assorted paperwork from Kagan's White House files that were posted online Friday [4 June] by the Clinton Presidential Library show Kagan to have cautiously steered Clinton toward the middle ground and away from extremes on policy issues such as crime control and anti-smoking legislation.

Her recommendations regularly cite fears that a negative reaction from Republicans could end up doing damage to the administration's policy goals.

However, divining Kagan's personal views from the documents is difficult because her own position is not always clear. Even when it is, current White House aides pushing for her confirmation say the stances she took may simply demonstrate her advocacy for Clinton's positions rather than any views of her own.

"The documents reflect Kagan's efforts to advance President Clinton's well-established policy agenda, and they should not be interpreted as an outline of her personal positions on specific policy issues," White House spokesman Ben LaBolt said.

Josh Gerstein, "Elena Kagan voice of caution," *Politico* (22:57 EDT, 4 June 2010)

<http://www.politico.com/news/stories/0610/38152.html>

The New York Times had a similar view:

Ms. Kagan's missives in the margins offer little hint of how she might behave if confirmed to the Supreme Court. But the 46,700 pages released Friday by the National Archives do offer glimpses into her thinking, revealing a woman who, like the president she worked for, was trying to balance competing policy objectives and chart a centrist course on matters as varied as abortion, race relations, immigration, AIDS, gun rights and embryonic stem cell research.

....

However, 263 pages will be withheld from the public because of "statutory restrictions," a White House official said. Though Mr. Clinton could have barred their release under executive privilege, he has permitted senators to review them on a confidential basis, the official said.

Sheryl Gay Stolberg, "Glimpses of Kagan's Views in Clinton White House," *The New York Times* <http://www.nytimes.com/2010/06/05/us/politics/05kagan.html> (4 June 2010).

Given the agreement that Kagan's memos from the late 1990s offer little insight into her personal opinions, and no insight into how she would rule on these issues as a Justice of the U.S. Supreme Court, *why* is there such a clamor from Republicans (e.g., Senator Jeff Sessions) demanding the production of these documents? Are the Republicans, as the opposition party to the president, really desperate for evidence to use in opposing her confirmation?

On Friday, 11 June, the Clinton Presidential Library released 42,000 pages of files that involved Kagan's legal work in the White House. Most of the commentary by journalists focused on Kagan's efforts to delay the Paula Jones litigation until after the President's term ended. The U.S. Supreme Court unanimously ruled²⁷ that the civil litigation could continue during the president's term of office, thereby rebuking Kagan's — and Clinton's — position.

On Friday, 18 June, the Clinton Presidential Library released Kagan's e-mails, which completed the public release of documents about Kagan. The Associated Press noted the lack of substantive evidence about Kagan's views, and also the omission of some documents:

Tens of thousands of pages worth of documents from Elena Kagan's past have left President Barack Obama's Supreme Court nominee relatively unscathed and important details about her still a mystery heading into confirmation hearings for a lifetime job as a justice. From the records, there is scant evidence about what kind of justice Kagan would be.

The Obama White House has worked to ensure that no revelation from the documents harms Kagan's chances. Working with former President Bill Clinton, officials shielded from public view most details about Kagan's work on the scandals that in many ways defined his tenure. That includes her role defending him from the Paula Jones sexual harassment lawsuit that led to his impeachment.

In all, nearly 160,000 pages were unearthed, including 80,000 pages of e-mail — an unprecedented release for a Supreme Court nominee. They were dribbled out on Friday afternoons, the customary time in official Washington for releasing unfavorable information or material one hopes attracts little notice. The e-mails emerged late Friday afternoon; the Pentagon documents on Saturday.

Julie Hirschfeld Davis, "Kagan unscathed after revelations from past," *The Associated Press* (21:24 EDT, 19 June 2010).

Kagan's finances

On Tuesday, 18 May, Reuters reported that Kagan is a millionaire with no debts:

Kagan reported a net worth of more than \$1.76 million as of January 1. She said she had nearly \$740,000 in cash on hand and in banks, about \$200,000 in U.S. government securities and more than \$824,000 in retirement funds. Her documents listed no liabilities.

Thomas Ferraro and James Vicini, "Supreme Court nominee Kagan is a millionaire," *Reuters*, (19:36 EDT, 17 May 2010).

The Associated Press reported on 18 May:

In the papers [provided to the Senate Judiciary Committee by the White House], Kagan reported her net worth at \$1.76 million, a nearly 75 percent increase over what it was when she was nominated to be solicitor general in January 2009. [¶] Two factors appear to account for the bulk of the increase. The stock market has recovered from its dramatic dip in 2008 and Kagan sold her residence in Cambridge, Mass., shedding \$1.2 million in mortgages and

²⁷ *Clinton v. Jones*, 520 U.S. 681 (1997).

pocketing some cash from the sale. Her assets are held in cash, money market accounts, mutual funds and retirement savings.

Julie Hirschfeld Davis, "Kagan papers emerge amid questions on abortion," Associated Press (21:46 EDT, 18 May 2010).

On the night of 18 May, two journalists reported:

She has lost \$500,000 since January 2009. On her financial disclosure reports, Kagan estimates her net worth at about \$1.7 million, including \$739,000 in cash and \$824,000 in retirement accounts. While she's doing better than most, she's not doing as well as she was just a year ago, when she listed her net worth at \$2.26 million. The difference between then and now is a home in Boston, which she listed as an asset at its 2004 purchase price of \$1.4 million, which she no longer owns. She now reports she owns no house and no car; has no investments outside of her retirement accounts; and has no debt.

....

Kagan has never tried a case to verdict. Although Kagan has gotten plenty of criticism from Republicans for her lack of judicial experience, she's gotten relatively little blowback for the fact that she had nearly no courtroom experience²⁸ before becoming solicitor general in 2009. Since then, she has argued six cases before the Supreme Court.

Patricia Murphy and Lynn Sweet, "Elena Kagan Bio: 10 Little-Known Facts, From Socialism to Spitzer," (18 May 2010)

<http://www.politicsdaily.com/2010/05/18/elena-kagan-bio-10-little-known-facts-from-spitzer-to-sociali/>

Kagan's current job as Solicitor General is temporary, and will end in 2012 when a new president replaces Obama. Kagan must have been very confident that she would *not* be returning to Harvard in 2012, because she decided to sell her house in Cambridge. Alternatively, she may have decided not to pay the mortgage, taxes, insurance, and maintenance on an *unoccupied* house in Cambridge, while she lived in Washington for four years.

On 20 May, a journalist gave more details about Kagan's salary, house, and finances:

Elena Kagan's estimated net worth grew 74 percent during her year as solicitor general, records show, an increase that a White House official attributes largely to the distribution of her mother's estate.

....

Kagan took a hefty pay cut when she became solicitor general last year. Kagan's annual salary as solicitor general is \$165,300. As dean of Harvard Law School, she made \$437,299.

....

²⁸ See my remarks at page 27, above.

The White House official, speaking on condition of anonymity, said Kagan will disclose more details about her mother's estate in the coming week, when she plans to file an annual financial disclosure report required of top executive-branch officials. Her mother, Gloria, died in July 2008.

....

In October [2009], as the Supreme Court was beginning its current term, Kagan sold her home in Cambridge, Mass., according to land records. The sale price was \$1.53 million, or \$131,000 more than its estimated value nine months earlier. She purchased the property in 2004 for \$1.4 million, and as of January 2009 had a mortgage balance of \$1.22 million.

Kagan no longer lists any assets under "Autos and other personal property." Last year, she listed assets in that category valued at \$25,000.

David Ingram, "Kagan Had Strong Financial Year in 2009," *The National Law Journal*, <http://www.law.com/jsp/article.jsp?id=1202458471182> (20 May 2010).

schedule

On Wednesday morning, 19 May, the chairman of the Senate Judiciary Committee scheduled confirmation hearings to begin on Monday, 28 June. The week after the hearings, the Senators have a one-week vacation that includes the 4 July holiday. The Senate will have another vacation, from 9 Aug to 10 Sep. The full Senate is expected to confirm Kagan sometime before Friday, 6 August 2010.

predicted votes

In 2009, Kagan was confirmed as Solicitor General by a vote of 61 to 31, with 7 Republicans voting for her, and 7 Senators not voting.²⁹ One might expect fewer votes in 2010, because the standards for a Justice of the U.S. Supreme Court may be higher than for a Solicitor General. Solicitor Generals have a duration of a few years, maybe all four years of Obama's administration, while a Justice is a lifetime appointment.

On 8 May 2010 (two days before she was nominated!), Tom Goldstein wrote a reasonable analysis of the final vote on Kagan's confirmation:

Generally speaking, I find it unlikely that Kagan would get many (if any) more votes than the 68 received by Justice Sotomayor, whom some Republicans found it difficult to oppose because she was the third female Justice, the first Hispanic, and had a powerful personal story. The Senate is also now more rigidly divided along party lines, in the wake of the health care fight. Although there were several facts in Sotomayor's record that demonstrated that she was relatively liberal – including not only her opinions but also her pre-judicial work for advocacy groups – whereas Kagan's record is far thinner on ideological questions, I expect

²⁹ Senate Vote Nr. 107, 111th Congress, first session (19 March 2009).

that Republicans' votes on the Sotomayor nomination will substantially guide their approach to a Kagan nomination.

....

So, in the end, I anticipate that Elena Kagan would receive approximately 65 votes in favor of her confirmation (3 fewer than Sotomayor): all 57 Democrats; 2 Independents; and 6 Republicans (Snowe and Collins; 2 Republicans on the Senate Judiciary Committee – Graham and Hatch; and Gregg and Lugar).

Tom Goldstein, "9750 Words on Elena Kagan,"

<http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/> (01:00 EDT, 8 May 2010).

During the next two weeks, other political commentators also mentioned a prediction of about 65 votes for Kagan, but without citing Tom Goldstein.

dearth of news

Above, at pages 16 and 19, I commented on the lack of news about the selection of a nominee for the U.S. Supreme Court from 14 April to 6 May 2010. After Kagan was nominated on 10 May, news coverage continued through the second day of her meet-and-greet, 13 May. After a few days of silence, there was another burst of news coverage on 18 May, when Kagan submitted her answers to the Questionnaire from the Senate Judiciary Committee. Then there was prolonged silence about Kagan in the mainstream news media. The little coverage after 20 May was mostly in right-wing publications or in legal publications.

During the second half of May 2010, the major news stories involved:

- The leaking oil well off the coast of Louisiana continues to gush crude oil, after the largest oil spill in U.S. history began on 20 April. On 30 May, the rate of flow is estimated to be about 800,000 gallons/day — four times previous estimates.
- Controversy continued over Arizona's new immigration statute.
- Congress continued to debate reform of the financial industry.
- Incumbents are being defeated in elections. Most notably, Arlen Specter's 30 y career in the U.S. Senate was ended by a primary election on 18 May.
- On 28 May, the total number of U.S. military personnel killed in Afghanistan since 2001 reached 1000. People seem to have forgotten that President Obama was elected in 2008, in part, to *end* the war in Afghanistan, but, instead, he expanded that war.
- A plethora of news articles about topics that will be quickly forgotten by nearly everyone.

On 26 May, the Associated Press reported on the relative lack of controversy about Kagan:

In an election year consumed by fights over health care, Wall Street and the big oil spill, Kagan's quiet march toward a lifetime seat on the nation's highest court is, at least for now, causing little stir. [9] That's no accident. Republicans and Democrats alike acknowledge privately that one of Kagan's major selling points as a Supreme Court nominee is the fact that just over a year ago, the Senate vetted her for the post of solicitor general — the top lawyer who argues the government's cases before the court — and she won confirmation with seven

Republican votes. [¶] That made her an easy pick for a president battling low approval ratings and juggling an ambitious agenda — and [her confirmation] ranks fairly low on lawmakers' radar screens.

....

And there's little of substance — at least for now — to power opposition to Kagan. The 50-year-old former Harvard Law School dean has never been a judge and litigated only a handful of cases, so she has a thin public record virtually devoid of ammunition for her critics. [¶] Democrats have more than enough votes to confirm Kagan, and so far Republicans appear to have little appetite for trying to block her through a filibuster.

Julie Hirschfeld Davis, “Kagan sparks little debate as hearings approach,” *The Associated Press* (15:46 EDT, 26 May 2010) <http://www.ajc.com/news/nation-world/kagan-sparks-little-debate-535959.html> .

On the night of 2 June, *The New York Times* reported on the apathy surrounding the Kagan nomination:

Something has been missing from the fight over the Supreme Court nomination of Elena Kagan: the fight.

When President Obama nominated Ms. Kagan, his solicitor general, to fill the seat being vacated by Justice John Paul Stevens, the usual array of Washington pundits and prognosticators predicted a summer dominated by a contentious battle over her confirmation. Nearly four weeks later, that battle has yet to crystallize, and Ms. Kagan seems to have emerged as a kind of Teflon nominee.

“This is not a coronation, it’s a confirmation,” Senator Jeff Sessions, the top Republican on the Senate Judiciary Committee, said in an interview on Wednesday, sounding more than a little bit frustrated.

....

In part, Ms. Kagan has benefited from the capital’s short attention span. With all eyes on the oil spill in the Gulf of Mexico — and confirmation hearings at the end of June, the Washington equivalent of light-years away — the nomination has fallen out of the news and the public is not yet engaged. A poll released last week by CBS News found that more than 7 in 10 Americans had yet to form an opinion of her.

Sheryl Gay Stolberg, “A Knock-Down, Drag-Out — Yawn,” *The New York Times*, <http://www.nytimes.com/2010/06/03/us/politics/03court.html> (2 June 2010).

The Wall Street Journal law blog repeated parts of the previous *Times* story under the title “Elena Who? Why the Summer’s Blockbuster is Looking Like a Dud.”

<http://blogs.wsj.com/law/2010/06/03/elena-who-why-the-summers-blockbuster-is-looking-like-a-dud/>

On 7 June, *Politico* reported that the Obama administration characterized Kagan as “boring”, and claimed that a boring nominee was easier to confirm.

Elena Kagan’s Supreme Court confirmation process has been so overshadowed by other events and issues, her name barely came up during President Barack Obama’s contentious lunch with Senate Republicans late last month.

Obama briefly solicited GOP support for Kagan, but not a single Republican raised a concern about her or asked a question about the nomination — instead, they focused on everything from health care to Iran to the Gulf oil spill, according to Republican senators.

Some kind of fight is certain to break out — what SCOTUS hearing hasn't had at least a little drama? — but so far, the White House isn't complaining about the lack of a spotlight on its well-coached, amiable and thus far noncontroversial nominee.

Republicans have found little in Kagan's public statements, private utterances and nonjudicial paper trail to make a major fuss about. When more than 46,000 pages of her work in the Clinton White House were released Friday afternoon, only a handful of Republicans and their conservative allies off Capitol Hill raised concerns about some of her liberal-leaning positions.

All of which is making some wonder: What if they held a confirmation battle, but nobody showed up for a fight?

"She's a little bit boring — and boring is good," said one administration official close to the process, who added that the lack of a bombshell rallying point — aka "wise Latina" — is a "huge help."

The administration is cautiously optimistic at the halfway mark of Kagan's scheduled interviews with all 100 senators, saying the former Harvard Law School dean has actually made a better, more polished impression than did Justice Sonia Sotomayor, who occasionally came off as prickly during her gantlet of similar interviews last year.

Manu Raju & Glenn Thrush, "'Boring' nominee stays under radar," *Politico* (04:59 EDT, 7 June 2010) <http://www.politico.com/news/stories/0610/38187.html>

concern about issues and ideology

On 25 May, Prof. Strauss of the University of Chicago Law School pointed out that the hot topics change with time:

A lot of the discussion about Elena Kagan's nomination to the Supreme Court consists of speculation about where she'll fit on the political spectrum with which we are all too familiar. Will she be a dramatic new voice on the left? (Some conservatives do not want her to be confirmed because they're afraid she will be; some liberals are disappointed because they're afraid she won't be.) Will she be a cautious centrist, who will actually move the Court to the right, compared to her predecessor, Justice John Paul Stevens? Will she be a cagey operative, able to sway the "swing Justice," Anthony Kennedy? And what do we make of the fact that she does not seem to have carved out a clear ideological profile so far in her career?

There's a place for this kind of speculation, but it risks ignoring one of the most important lessons from the history of the Supreme Court: the issues that mean so much when a Justice is appointed often fade from view, and others take their place. If Kagan is confirmed, she is likely to serve on the Supreme Court for a generation. There is no reason to think that the issues that preoccupy us today—abortion, affirmative action, gun rights—will be the issues that determine her place in history. And we can only guess what issues might be flashpoints on the Supreme Court decades from now.

David A. Strauss, "Kagan and the great unknown," *The Washington Post*, http://voices.washingtonpost.com/political-bookworm/2010/05/kagan_and_the_great_unknown.html (05:30 EDT, 25 May 2010).

While Prof. Strauss is undoubtedly correct that significant new issues will appear during the next thirty years, I disagree with Prof. Strauss that positions on major issues are *unimportant*. If the Supreme Court were to weaken the legal right to abortion, that would have enormous consequences, not only for women with undesired pregnancies, but also for anyone seeking to expand the right of privacy. Similarly, if the Supreme Court were to decide that affirmative action discriminates against white males, that would have enormous implications in hiring practices, college admissions, and other opportunities for minorities. Issues like undesired pregnancies and alleged discrimination in hiring will continue.

There are two famous cases that most American citizens recognize, because these cases had a profound and continuing effect on life in the USA: (1) *Brown v. Board of Education*, 347 U.S. 483 (1954) and (2) *Roe v. Wade*, 410 U.S. 113 (1973). *Brown* partly destroyed the traditional concept of children attending the nearest school, as children were transported across town by bus to put more white children in traditionally black schools, and to put more black children in traditionally white schools, thereby achieving instant integration of public schools. *Roe* has become a major issue for the Republican party since the late 1970s, as repealing *Roe* is part of the agenda for Republicans, especially Evangelical Christians and Catholics. The aftermath of these two cases is still being argued in federal courts in 2010, and will continue to be argued in courts for the foreseeable future. Many other Supreme Court decisions affected the lives of most Americans, but nonlawyers generally remain ignorant of those other decisions.

On 26 May, a journalist noted the presence of ambiguous statements from Kagan in her meager writings:

Some of Supreme Court nominee Elena Kagan's detractors found a passage in her writings that they say endorses the view that a judge's work is outcome-based, influenced by personal opinion and experience. [9] Her supporters counter by pointing to a piece that details Kagan's strong criticism of judicial decisions that are reached without the proper grounding in law and precedent. [9] Those still trying to make up their minds about President Obama's choice for the high court will find fodder for both positions in the same document, her thesis as a 22-year-old student at Oxford. [9]

Because Kagan, 50, has never been a judge and has not published a major work since 2001, her record lacks the "paper trail" that other nominees in recent years have had. But it also seems at times contradictory, or at least ambiguous.

Robert Barnes, "Senators will have less background on Kagan to help make Supreme Court decision," *The Washington Post*, p. A03 (26 May 2010)

<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/25/AR2010052502294.html> .

I believe that ideology of a nominee is important. But the legal requirement of impartiality of a judge prevents nominees to the bench from answering questions on specific issues.³⁰ The way to learn about a nominee's ideology is to read his/her publications and transcripts of his/her speeches, but a stealth candidate — like Kagan — has a thin and ambiguous paper trail that permits few certain conclusions.

However, people change with time, and even if we know Kagan's ideology in June 2010, she might change in ten years. It's happened recently before, as Justices Brennan, Stevens, and Souter each changed from moderate to liberal. This lesson from history indicates that it is futile to predict the future, and so investigations about ideology of a 50 y old nominee may be a waste of time. Furthermore, a nominee's promise in confirmation hearings to vote a specific way on a specific issue is *not* a legally binding promise, for reasons explained in my earlier essay at <http://www.rbs0.com/sotomayor2.pdf> , pp. 73-76 (7 Aug 2009).

My concern about Kagan is *not* whether she has the “correct” or “wrong” ideology, but that — for thirty years — she has avoided taking positions that might offend someone. As a Justice of the U.S. Supreme Court nearly every opinion that she writes or joins will offend someone. I'm not sure how Miss Congeniality will make the transition to being *unpopular* for both her opinions and her votes at the Court. One way would be for her to write ambiguous opinions that muddle the law and offer no clear guidance for trial courts — and that would be a very bad outcome for everyone.

On 25 May, Senator Specter (D-Penn.) wrote to Kagan and explicitly told her of eight questions he would ask her during her confirmation hearings at the end of June. I posted a copy of Specter's letter at <http://www.rbs0.com/Specter100525.pdf> .³¹ Specter's questions on (1) contract claims by Holocaust victims and their heirs, (2) the Foreign Sovereign Immunities Act and (3) President Bush's *unconstitutional* Terrorist Surveillance Program are all issues that could easily come before the Supreme Court after Kagan is confirmed, and, therefore, she must refuse to answer those questions.

³⁰ See, e.g., Standler, The Nomination of Justice Sotomayor, <http://www.rbs0.com/sotomayor.pdf> at pp. 5-9 (3 Aug 2009).

³¹ This news story was reported by David Ingram, “Specter Gives Kagan a Confirmation Tip Sheet,” *The Blog of Legal Times*, (15:28 EDT, 26 May 2010) <http://legaltimes.typepad.com/blt/2010/05/arden-specter-gives-elena-kagan-a-confirmation-tip-sheet.html> .

On 19 June, *The New York Times* reported Bill Clinton's recollection of Kagan. What I find most significant are the final two paragraphs of the article:

As for concerns from the left that Ms. Kagan might be too much of a centrist to provide a liberal counterweight to conservative justices, Mr. Clinton acknowledged that he did not see her as a liberal in the mold of Justices Thurgood Marshall or William J. Brennan Jr.

“I think she is really sort of a common-sense progressive,” he said. “I think she has good liberal values, but she is also immensely practical, and I think she will be fair to both parties.”

Carl Hulse, “Bill Clinton Speaks Out on Kagan,” *The New York Times* (19 June 2010)

<http://www.nytimes.com/2010/06/20/us/politics/20clinton.html>

Clinton, who strongly supports Kagan's confirmation to the Court, sees Kagan as more moderate than Marshall and Brennan. Kagan is probably more moderate than Justice Stevens, who Kagan will replace. This means that Justice Kagan will tilt the Court more to the right, or away from the liberal positions of Stevens. That concerns me, because I want a liberal justice who will expand privacy rights for citizens. And liberals should feel betrayed by President Obama, who despite a large majority for Democrats in the Senate, failed to nominate a liberal judge or a liberal law professor.

“Confirmation Messes”

But, despite the above-mentioned good reasons *not* to ask nominees about their personal views on controversial issues, Kagan herself is on record as urging nominees to state their views:

... the real “confirmation mess” is the gap that has opened between the Bork hearings and all others (not only for Justices Ginsburg and Breyer, but also, and perhaps especially, for Justices Kennedy, Souter, and Thomas). It is the degree to which the Senate has strayed from the Bork model. The Bork hearings presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction. Subsequent hearings have presented to the public a **vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.**³² Such hearings serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government. Neither can such hearings contribute toward an evaluation of the Court and a determination whether the nominee would make it a better or worse institution. A process so empty may seem ever so tidy — muted, polite, and restrained — but all that good order comes at great cost.

Kagan, “Confirmation Messes, Old and New,” 62 *UNIV. CHICAGO LAW REVIEW* 919, 941

(Spring 1995), <http://lawreview.uchicago.edu/archive/Front%20Page/Kagan/ConfirmationMessesOldAndNew.pdf> .

I am going to be full of cynicism if the Senate confirms Kagan without Kagan making a full and open disclosure of her personal viewpoints, as she promised in 1995. <smile> It is strange that

³² Boldface added by Standler.

Kagan holds up the Bork hearing as a model of a good confirmation process, because Bork lost.³³ One should *not* expect the White House and the nominee to pursue a strategy that is likely to end in defeat of the nominee.

Earlier in her article, Kagan says about qualifications:

.... Must, for example (as Carter previously has argued [footnote: Carter, *The Confirmation Mess*, 101 HARV L REV 1185, 1188 (1988).]), a nominee have served on another appellate court — or may (as I believe) she demonstrate the requisite intelligence and legal ability through academic scholarship, the practice of law, or governmental service of some other kind? Carter writes that we must form a consensus on these issues and then rigorously apply it — so that the Senate, for example, could reject a nomination on the simple ground that the nominee lacks the qualifications to do the job ([Carter's book] p 162). On this point, Carter surely is right. **It is an embarrassment that the President and Senate do not always insist,**³⁴ as a threshold requirement, that a nominee's previous accomplishments evidence an ability not merely to handle but to master the "craft" aspects of being a judge. In this respect President Clinton's appointments stand as models. No one can say of his nominees, as no one ought to be able to say of any, that they lack the training, skills, and aptitude to do the work of a judge at the highest level.

Kagan, 62 UNIV. CHICAGO LAW REVIEW at 932. I agree with Kagan that the selection of nominees and the confirmation process is an “embarrassment” — the political process generally lacks merit, and avoids the best qualified candidates for the U.S. Supreme Court. But I am not sure that we can find a consensus about credentials. For example, some Justices (e.g., Earl Warren, Fred Vinson, Harold Burton) were formerly politicians, who I believe are inferior to both judges on the U.S. Courts of Appeals and law professors who are experts in constitutional law. But even in recent years, we see politicians on the list of candidates seriously considered by the President for nomination to be Justice.

On 3 June, the Associated Press reported that Kagan's words in 1995 will return to haunt her:

Supreme Court nominee Elena Kagan's review of the book "A Confirmation Mess" is creating a confirmation mess of its own. [¶] Kagan's 1995 commentary on Stephen Carter's book rendered a harsh judgment on how lawmakers question Supreme Court nominees, and that has some senators preparing to interrogate her about it.

“I talked to her about that essay,” said Sen. Patrick Leahy, D-Vt., chairman of the Senate Judiciary Committee. “She said, ‘I think I'm probably going to hear that quoted back to me a few times during the hearing.’ I said, ‘Starting with me.’ ”

It will make for some uncomfortable moments for Kagan during her confirmation hearings, scheduled to begin June 28. When she wrote her article in the *University of Chicago Law Review*, she had just had an up-close view of the confirmation process as a Judiciary Committee staffer during Justice Ruth Bader Ginsburg's confirmation hearings.

³³ Only 42 senators — 40 Republicans and 2 Democrats — voted for Bork. Six Republicans (Chafee, Packwood, Specter, Stafford, Warner, Weicker) voted *against* Bork. CONGRESSIONAL RECORD at S 29121 (23 Oct 1987).

³⁴ Boldface added by Standler.

....

Sen. Dianne Feinstein, D-Calif., said she brought up Kagan's criticisms of her predecessors' testimony during a private visit in the senator's office. "What I said is, 'I trust you are going to be a paragon of exactly the opposite of what you wrote about,' " which Feinstein said brought laughs from both women.

Kagan already has started backing away from her own statements. During her confirmation for her solicitor general job last year, she said she sees things differently now that she's older, no longer on the Senate staff and — most importantly — someone who herself faces confirmation.

"I wrote that when I was in a position of sitting where the staff is now sitting, and feeling a little bit frustrated ... that I really wasn't understanding completely what the judicial nominee in front of me meant, and what she thought," Kagan said in her 2009 hearing. Jesse J. Holland, "In old article, Kagan invites tough questioning," Associated Press, (12:14 EDT, 3 June 2010). In my opinion, it is *in*appropriate for Kagan to want credit for her [meager] scholarly publications and then disavow the content in 2009-2010.

Republican opposition

On 24 May, Jeff Sessions (R-Alabama.), ranking Republican on the Senate Judiciary Committee, made a speech on the floor of the Senate:

I also wish to express a concern about one more matter. During her time in the Clinton White House, 1995 to 1999, Dean Kagan, now Solicitor General Kagan, served in the White House Counsel's Office and later as Director of Domestic Policy Council in the White House. That is one of the few extensive public records she has. We need to obtain the documents relating to that service in advance of the hearings that now have been set for June 28. I think it is a rush to get ready for June 28, but I told Senator LEAHY, our chairman, that he is the boss, and we will try to be ready by the 28th. But we both know it is important to have these documents in time to examine them before the committee hearing because so little other documents exist as to her record.

....

In the letter we received on Friday, the library indicated they will start delivering documents by June 4 — three weeks before the hearing — and then they will make additional deliveries on a rolling basis. They did not tell us by when they will provide all the documents. I know they have a hard job. Maybe they have to do all these things, but the fact is we have a deadline that has been set by Chairman LEAHY to start the hearing on June 28, and we are not able to, in my view, conduct a good hearing if we don't have the documents.

So I am trying to make clear to my colleagues that we are heading toward what could be a train wreck. I don't believe this committee can go forward without these documents in the request and have an accurate hearing. The public record of a nominee to such a lifetime position as Justice on the Supreme Court is of such importance that we cannot go forward without these documents. I hope we will get those in a timely fashion. If not, I think we will have no choice but to ask for a delay in the beginning of the hearings.

Senator Sessions, "Kagan, Elena: nomination to be Supreme Court Justice," *Congressional Record*, S4109-S4110 (24 May 2010).

Senator Sessions' speech was summarized by the Associated Press:

The top Republican on the Senate Judiciary Committee warned Monday that he would seek to slow Supreme Court nominee Elena Kagan's path to confirmation unless senators get full access to her files as a Clinton administration aide. [¶] "We're heading to what could be a train wreck," Sen. Jeff Sessions of Alabama said. "I don't believe that this committee can go forward with an adequate hearing" without all records from Kagan's tenure as a White House counsel and then domestic policy adviser to President Bill Clinton.

Julie Hirschfeld Davis, "Senator: No Kagan hearings without Clinton files," The Associated Press (17:33 EDT, 24 May 2010).

Senator Sessions reminds me of a dog that is chained to a tree, but who nonetheless barks savagely at every person who walks by its owner's house. The Republicans do not have the votes to block the confirmation of Kagan, so all the opposition³⁵ party can do is growl and be obnoxious. And the opposition party will growl and be obnoxious, and maybe delay her confirmation by a few weeks. But, in the end, Kagan will be confirmed, and the noise from the opposition party is without significance. The confirmation process has become a meaningless spectacle, full of partisan politics, and lacking in any kind of serious significance.

On 21 June, Senator Jeff Sessions, the ranking Republican on the Senate Judiciary Committee, got his name in the news for belligerently threatening to boycott the hearings on Kagan:

Alabama Sen. Jeff Sessions, the top Republican on the Judiciary Committee, on Monday evening warned that Republicans may boycott the start of Elena Kagan's Supreme Court hearings if senators do not get to review scores of documents from the solicitor general's past.

"I don't feel like we're prepared yet," Sessions told POLITICO. "It's becoming more clear that this is not an easy thing to get ready this quick."

Sessions said there appeared to be 1,600 withheld documents, which cover Kagan's time as a senior White House aide under President Bill Clinton but were not released because of confidentiality concerns. And he called for the Obama administration to at least provide key senators and staff with a chance to privately review the confidential documents so they could weigh in on the validity of the decision to withhold the documents.

Manu Raju, "GOP may boycott Kagan hearings," *Politico* (20:02 EDT, 21 June 2010)

<http://www.politico.com/news/stories/0610/38827.html>

A boycott, of course, would mean swifter confirmation hearings, and probably longer debate on the floor of the Senate, but Kagan's confirmation is still a *fait accompli*. It would be surprising if *any* of the documents from her time in the Clinton administration were really relevant to Kagan's being confirmed as a Justice, because Kagan's service to Clinton was political, not judicial.

³⁵ I say "opposition", because if a Republican were president and the Democrats had 40 votes in the Senate, the situation would be identical — an opposition party with a minority in the Senate is powerless.

Is education a purpose of hearings?

On 21 June, an experienced appellate litigator tried to explain to the public what the U.S. Supreme Court really does:

I have a modest request: that the upcoming Supreme Court confirmation hearings be an occasion for public education about what that court actually does and an inquiry into whether Elena Kagan possesses the attributes to do it well. At least, please spare us the spectacle of senatorial bloviating to extract a pledge to decide cases without actually making choices, by the mechanical application of the law to the facts, like a calculator doing math.

Recent history is not promising. Since 2005, when then-Judge John Roberts analogized the justices' role to an umpire calling balls and strikes, each hearing has dug us in deeper. While the chief justice's analogy is fair enough as a statement that justices must be impartial, it has been taken to mean much more. The coup de grace came last year, when, under intense senatorial grilling, Sonia Sotomayor of all people pledged to just apply the law to the facts, promised never to let an empathetic thought into her judicial reasoning and denied any relevance to her life experience. Liberal commentators expressed disappointment; Justice Samuel Alito offered a public "atta girl."

The trouble is, mechanical, objective decision making is not what the Supreme Court does. Ever. It is comforting to think that elected legislators legislate, the elected president executes and unelected judges make no choices. While lower courts, to the extent that they handle straightforward, routine cases, may at times approximate this ideal, the Supreme Court, by design, does something entirely different.

The Supreme Court has near total discretion over the cases it hears and selects ones that have no easy answers. The one in 100 cases it hears mostly raise legal issues that have seriously baffled lower courts and produced substantial disagreement among them. Where, as is typical, substantial numbers of thoughtful judges have differed after giving it their best shot, real uncertainty exists as to what the law is.

Here's the rub: In nearly all the high court's cases, doubt exists not because the half or so of judges who decided the issue are stupid, don't get it or otherwise made some identifiable mistake. Rather, doubts exist because there are substantial persuasive arguments on both sides that cannot be dismissed as invalid or wrong. These cases must be resolved by deciding which collection of arguments is the more compelling; the justices make decisions by choosing to give priority to one set of contentions or another.

This is true of many constitutional cases, both because the Constitution is often unspecific and, as retired Justice David Souter recently observed [in his speech at Harvard University on 27 May 2010 <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>], because its splendid generalities, such as equality and liberty, are sometimes in tension with one another. It is also true in the much greater number of more routine cases, such as where the words of a statute leave doubt about its coverage or effect.

Donald B. Ayer, "Why the high court's work goes beyond 'balls and strikes'," *The Washington Post*, p. A17 <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/20/AR2010062002365.html> (21 June 2010). I think Mr. Ayer is exactly correct in identifying how the U.S. Supreme Court actually works. My disagreement with Mr. Ayer is whether a confirmation hearing is the appropriate place to educate citizens about the Court.

It seems obvious to me that the only purpose of a judicial confirmation hearing is to review the credentials of a nominee and decide whether that person is qualified to be a judge. Education of citizens is best left to civics classes in schools, classes that *all* American children are required to attend.³⁶ Only a tiny fraction of citizens will watch confirmation hearing on television cable channels or read the hearing transcript, and those citizens probably already understand the role of the Court and how the Court operates.

An additional reason not to use confirmation hearings to educate citizens is that most of the members of the Senate Judiciary Committee are *unqualified* to teach constitutional law. Indeed, some of those senators never attended law school.³⁷ Teaching constitutional law is *not* the job of a senator, and their questions for nominees often show an abysmal ignorance of both judicial ethics and constitutional law.

Lack of Coverage by Journalists

There was a burst of reports in the news media on 9 April 2010 when Justice Stevens announced he would retire, and another burst of reports on 10 May when President Obama nominated Kagan. In between, there was a dearth of news about the vacancy on the Court, see pages 16 and 19, above. I have the impression that there was *much more* discussion in the news media of the process of nominating a replacement for Justice Souter in May 2009. I do not understand why the nation is less interested in the U.S. Supreme Court in 2010, as compared to 2009. The economic mood in 2010 is dreadful, and many people may be disillusioned with government. Also, there was a consensus amongst commentators that Kagan would be the nominee, which removed most of the suspense from this slowly developing news story. For whatever reason, the really striking thing about the selection of Kagan was the lack of news coverage. Above, at page 55, I commented about the lack of news about nominee Kagan after about 20 May.

I did an experiment to objectively compare at two leading newspapers the number of articles about Sonia Sotomayor with the number of articles about Elena Kagan, in the three weeks before their confirmation hearings began in the U.S. Senate Judiciary Committee. Sotomayor's hearings began on Monday, 13 July 2009, so I searched for articles about Sotomayor published from Saturday, 20 June to Friday, 10 July 2009. Kagan's hearings began on Monday, 28 June 2010, so I searched for articles about Kagan published from Saturday, 5 June to Friday, 25 June 2010. I searched only for the last name of the nominee in all sections of the newspaper.

³⁶ In theory, citizens could learn about the Court from reading books from a public library. Given the apathy about this nomination, I do *not* expect citizens to read library books.

³⁷ Of the 19 members in June 2010, six (32%) never attended law school: Kohl, Feinstein, Grassley, Coburn, Kaufman, and Al Franken.

	<i>Wash.Post</i>	<i>New York Times</i>
Sotomayor	29	41
Kagan	16	18

I think these results show significantly less news coverage of Kagan, compared with Sotomayor.

Confirmation Hearings

My take on the confirmation hearings:

1. Her confirmation is a *fait accompli*. The Democrats hold a significant majority and the Republicans have no evidence that would disqualify her from being confirmed.
2. The issue before the U.S. Senate is *not* whether Kagan is the “best qualified” person, but rather whether she has minimal credentials to be a Justice. Kagan is obviously qualified to serve as a Justice of the U.S. Supreme Court, as are hundreds of judges, law professors, and experienced appellate litigators. Because her qualifications are obvious, it should *not* require three days of hearings to determine the obvious.

Given my view, the extent of the hearings in the Judiciary Committee and the amount of so-called debate on the floor of the Senate are irrelevant. All that matters is the final vote, and that vote will surely confirm her. The detailed process in the Judiciary Committee and on floor of the Senate, beginning 28 June and continuing until the final vote is largely irrelevant, because it will not change the result of the final vote. For that reason, I decided to ignore the confirmation hearings.

minimal coverage by journalists

On Monday morning, 28 June, the first day of Kagan’s confirmation hearings, the top story in the morning *Washington Post* was that Senator Robert Byrd of West Virginia had died at 92 y of age. At 22:00 EDT on Monday, the top story on the homepage of *The New York Times* website was that ten people were arrested in the USA as spies for Russia, but Kagan was the Nr. 3 story on the national news webpage of *The New York Times*. On Monday night, Kagan was the Nr. 4 story on the homepage of *The Washington Post*.

On 29 June, the second day of Kagan’s confirmation hearings, she was the top story at *The Washington Post*. When Senator Kohl asked her about ideology, a topic that Kagan’s 1995 book review said was fair inquiry, Kagan refused to answer. Kagan refused to discuss issues that might come before the Court, again repudiating her 1995 book review. When Senator Kyl asked her about Obama’s empathy standard for Justices, Kagan rejected Obama’s empathy standard and said she would do “what the law requires” and apply the law.

On the morning of 30 June, Kagan was *not* mentioned on the homepage of *The New York Times*, but Kagan was the Nr. 2 story on the national news webpage of *The New York Times*. However, Kagan was on the frontpage of *The Washington Post*.

At 13:00 on 1 July, the day after Kagan finished testifying, *The Washington Post* homepage contained only two links to stories about her testimony, with a total of five words: “Kagan finishes hearings; critics charmed”, and both stories were on page A04 of the printed newspaper. The news media has a very short attention span, and yesterday’s big story has almost disappeared today.

Kagan testified on three days, for a total of 17 hours. The fourth and final day of hearings — Thursday, 1 July — featured testimony from other witnesses. Journalists essentially ignored the fourth day of hearings. The best coverage of the fourth day of hearings that I saw³⁸ was a mere seven sentences at the end of a *Washington Post* article.³⁹ On Thursday, the National Rifle Association issued a statement opposing the confirmation of Justice Kagan, and the NRA statement received more attention from journalists than the fourth day of hearings.

The lack of critical analysis of the hearings by journalists and legal commentators leaves no consensus on the proper scope of questions to a judicial nominee. The Associated Press reported the failure of Kagan to honor her promises in her 1995 book review (see page 60, above):

Elena Kagan declined to discuss her passions, demurred when asked anything that might tip her hand on the Supreme Court and invoked her right to remain inscrutable even on cases buried in the past. [¶] In short, Kagan did her best to ensure her high court nomination hearing was just the kind of benign event she criticized years ago for lacking "seriousness and substance."

Calvin Woodward, “SPIN METER: Kagan urged substance, then dodged it,” Associated Press (11:42 EDT, 1 July 2010). My personal view is that Kagan was either (1) incompetent⁴⁰ in 1995 when she suggested that judicial nominees should disclose their positions on issues that are likely to come before the court or (2) a hypocrite in 2010 for ignoring what she advocated in 1995.

Prof. Susan Estrich — the manager of Michael Dukakis failed presidential campaign in 1988 and currently professor of political science and law at the University of Southern California — criticized the confirmation process, and noted Kagan's lack of controversial positions:

Supreme Court confirmation hearings are nothing but a charade. "Balls and strikes" is what John Roberts said he'd call. Sonia Sotomayor, no fool she, said the same. Elena Kagan, ditto, is going to be a neutral arbiter. She isn't a "progressive." She will be fair and open. [¶] Of course. She'd be crazy to say otherwise.

³⁸ I searched Google News on the night of 2 July, as well as looked at *The Washington Post* and *The New York Times*, as well as the links at the Federalist Society.

³⁹ Paul Kane and Amy Goldstein, “Kagan expected to be confirmed to Supreme Court with little Republican support,” *The Washington Post*, (2 July 2010) <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/01/AR2010070106498.html>

⁴⁰ Incompetent in the sense that she *should* have done legal research about the legal obligation of all judges to be impartial, including not taking positions on issues that they might be asked to decide.

Once upon a time, back when she wasn't sitting at the table, Kagan suggested that prospective justices should try to outline their constitutional views at the confirmation hearings. Senators might learn more about who they were voting for. The watching public might learn something, period.

Not a chance. Now senators pretend to "learn" something by reading memos the would-be justice wrote nearly three decades ago as a law clerk. Would-be justices spend three days forgetting everything they learned about judicial decision-making in law school and since, claiming that values have nothing to do with it; neutrality is the watchword. It's not an educational experience for anyone. It's a game of "gotcha," and the way you don't get gotten is, basically, to say nothing.

....

Watching the confirmation hearings, unless you're a masochist or a satirist, is a waste of time. You learn nothing except how silly the process has become. Ever since Robert Bork — who was highly qualified but also arrogant and divisive — went down in flames at his hearing, every successive nominee has understood that the game is to say as little as possible, disown prior controversies, eschew any hint of ideology and simply endure.

....

But the message it sends is all wrong: If you dream of being a justice, don't ever take a controversial position. Imagine if she had represented an individual accused of terrorism. Imagine if she had actually written law review articles advocating truly progressive positions.

The funny thing about these hearings is how little months of digging for dirt on Kagan have revealed. In fact, she has been extremely careful in what she has said and written, far more careful than most law professors I know. Investigations into her personal life have failed to reveal poor choices and bad moments, which is more — or less — than I can say for most highly qualified 50-year-olds I know.

It's a ridiculous standard to have to meet to serve on the bench. Indeed, so far as taking controversial positions and representing controversial clients, **it is one that does not necessarily produce the people of courage and conviction we need on the federal bench.**⁴¹ But sadly, it has become the operative test. Most people who run for president, including those who win, could never be confirmed as a justice — too human, too many mistakes in life. How ridiculous.

Susan Estrich, "The Supreme Charade," (30 June 2010)

<http://www.creators.com/opinion/susan-estrich/the-supreme-charade.html>

I find it interesting that Prof. Estrich failed to criticize Kagan for consistently avoiding a public positions on controversial issues. Apparently, Estrich is only concerned with the confirmation process, not with the values of the current nominee. Failing to take a position on controversial issues is a choice — a cowardly choice, and I think that failure says a lot about Kagan's values.

⁴¹ Boldface added by Standler.

no contemporary transcript

During each of the previous recent confirmation hearings (beginning with Chief Justice Roberts in 2005), *The Washington Post* commissioned written transcripts of the hearings, which were published at the *Post* website a few hours after a senator completed his questioning of the witness. Several other newspapers (e.g., *The New York Times* and *Los Angeles Times*) also posted quick transcripts of the hearings. However, these newspapers published no contemporaneous transcripts of the Kagan hearings.

At 12:56 EDT on Thursday, 1 July — day 4 of the hearings — *The Washington Post* finally posted unofficial transcripts of the hearings. Day 1:

http://www.washingtonpost.com/wp-dyn/content/article/2010/07/01/AR2010070103025_pf.html

Day2 (101 pages):

<http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf>

Day3 (84 pages):

<http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf>

official transcript

Eventually, the official transcript of Kagan's hearing will be posted — along with other transcripts of confirmation hearings, beginning with Justice Powell in 1971 — at:

- The Senate website
http://www.senate.gov/pagelayout/reference/one_item_and_tasers/Supreme_Court_Nomination_Hearings.htm
- Government Printing Office: <http://www.gpoaccess.gov/congress/senate/judiciary/scourt.html>
- Library of Congress: <http://www.loc.gov/law/find/court-nominations.php>

Votes

statements by senators

On Friday, 2 July 2010, Senator Orin Hatch (R-Utah) announced he would vote against the confirmation of Kagan.

Supreme Court Justices who, like General Kagan, had no prior judicial experience did have an average of 21 years in private legal practice. General Kagan has two. The fact that her experience is instead academic and political only magnifies my emphasis on judicial philosophy as the most important qualification for judicial service.

....

General Kagan is a good person, a skilled political lawyer, a brilliant scholar, and was a fine law school dean. I like her personally and I supported her to be Solicitor General. But applying the standard I have always used for judicial nominees, I cannot support her appointment to the Supreme Court.”

Orin Hatch, “HATCH ANNOUNCES OPPOSITION TO ELENA KAGAN'S SUPREME COURT NOMINATION,” Press Release (2 July 2010). Senator Hatch has been a member of the Senate Judiciary Committee since 1977 and he was chairman of that Committee during 1995-2001 and 2003-2005, so his opinion may influence other Republicans. Indeed, later on 2 July, Senator Bennett (R-Utah) announced he would follow Senator Hatch in opposing Kagan’s confirmation.

Also on 2 July, Senator Mitch McConnell — the leader of the Republicans in the Senate — announced he would vote against Kagan.

In her testimony this week, Ms. Kagan acknowledged that it is “difficult to take off the advocate’s hat and put on the judge’s hat.” That difficulty is particularly acute for someone like Ms. Kagan, who has spent so much of her adult life practicing the art of political advocacy rather than practicing law.

....

I do not have confidence that if she were confirmed to a lifetime position on the Supreme Court she would suddenly constrain the ardent political advocacy that has marked much of her adult life. The American people expect a justice who will impartially apply the law, not one who will be a rubberstamp for the Obama administration or any other administration. For these reasons, I will oppose Ms. Kagan’s confirmation.

Mitch McConnell, “Republican Leader: ‘I Will Oppose Ms. Kagan’s Confirmation’,” Press Release (2 July 2010).

On Thursday morning, 15 July, *USA Today* published an editorial by Senator Arlen Specter that described why he would vote for the confirmation of Justice Kagan:

Supreme Court nominee Elena Kagan did little to undo the impression that nominating hearings are little more than a charade in which cautious non-answers take the place of substantive exchanges.

In this, she was following the practice of high court nominees since Judge Robert Bork. But her non-answers were all the more frustrating, given her past writings that the hearings were vacuous and lacked substance. She accused Justice Ruth Bader Ginsburg and Stephen Breyer of stonewalling, but then she did the same, leaving senators to search for clues on her judicial philosophy.

Her hearings showed an impressive legal mind, a ready humor and a collegial temperament suitable to the court. But they shed no light on how she feels about the court's contemptuous dismissal of Congress' "fact-finding" role, its overturning of precedent in allowing corporate political advertising, and the expansion of executive authority at the expense of congressional power.

....

On balance, Kagan did little to move the nomination hearings from the stylized "farce" (her own word) they have become into a discussion of substantive issues that reveal something of the nominee's judicial philosophy and predilections.

It may be understandable that she said little after White House coaching and the continuing success of stonewalling nominees. But it is regrettable. Some indication of her judicial philosophy may be gleaned by her self-classification as a "progressive" and her acknowledged admiration for Justice Thurgood Marshall. That suggests she would uphold congressional fact-finding resulting in remedial legislation and protect individual rights in the congressional-executive battles.

The best protection of those values may come from the public's understanding through television of the court's tremendous power in deciding the nation's critical questions. In addition to her intellect, academic and professional qualifications, Kagan did just enough to win my vote by her answers that television would be good for the country and the court, and by identifying Justice Marshall as her role model.

Arlen Specter, "Specter: 'Kagan did just enough to win my vote'," *USA Today* (15 July 2010)
http://www.usatoday.com/news/opinion/forum/2010-07-15-column15_ST1_N.htm

Senator Specter fails to understand that the concept of judicial impartiality prevents candidates from the judiciary from taking public stands on issues that they may be called upon to judge. Even if the candidate were to take positions on issues during confirmation hearings, the concept of separation of powers prevents the Senate from removing a judge from office because of mere disagreement with the judge's decisions. Specter has been an advocate for showing oral arguments at the Supreme Court on television, but to understand oral arguments one must understand the cases that are referenced in the questions and answers. Constitutional law is an arcane specialty that few attorneys in the USA understand, and constitutional law is beyond the comprehension of most nonlawyers. Oral arguments in constitutional law often contain a barrage of names of U.S. Supreme Court cases, which names are understandable only if you spent the last twenty years of your life reading opinions of the U.S. Supreme Court.

During the vote in the Senate Judiciary Committee on 20 July 2010, Lindsey Graham (R-SC) gave a short speech in the Committee meeting that explained why he was voting for the confirmation of Kagan:

....

As to Ms. Kagan, I thought she was smart. I don't think anyone's questioned that. That's good, if you're going to be on the Court. It's good to have smart people there.

She was funny. That goes a long way in my book. That shows some self-confidence, that you can laugh at yourself. That shows that you're pretty comfortable with who you are.

She has an impressive background. She's academically gifted. She's liberal. That one caught me by surprise. But yes, she's liberal. I sort of expected that, actually.

When it came to being solicitor general, I think she's acquitted herself pretty well. Some of my colleagues have some problems with the way she represented the government in certain cases. I understand their concerns. But generally speaking, I thought she's done a good job representing our nation on War or Terror issues, which are very, very important to me.

....

Now, what was I talking about in terms of the Constitution? I'm going to read to you, if I can find it here, Federalist Number 76, Alexander Hamilton. He indicated that the Senate "should have a special and strong reason for the denial of confirmation." Hamilton continued,

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, would tend generally to prevent the appointment of unfit characters from family connection, from personal attachment, and from a view to popularity.

Seventy-three of the 126 Supreme Court nominations that I've been informed by my staff — and I hope they're right — were done without roll call votes. Something's changing when it comes to the "Advice and Consent" clause.

All of us abhor judicial activism because it's a threat to society in general when an unelected judge takes on a role outside of their sphere. The question I have for the body: Are we living in an age of legislative activism, where the words haven't changed in the last 200 years, but certainly the voting patterns are? The confirmation hearings themselves certainly have changed. What does it mean?

Senator Obama was part of the problem, not the solution. One of the problems he has is, when he had the role of Advise and Consent, he sort of turned it upside down and talked about qualifications and temperament being about 70 percent or 80 percent and what's in your heart being the last. What's in Elena Kagan's heart is that of a good person who adopts a philosophy I disagree with.

Now, the *Washington Times* wrote an editorial about three good reasons I could vote no. I could give you 100 reasons why I could vote no if I based on — my vote on how she disagrees with me.

No one spent more time trying to beat President Obama than I did, except maybe Senator McCain. I missed my own election and voted absentee. But I understood we lost, President Obama won, and I've got a lot of opportunity to disagree with him. But the Constitution in my view puts a requirement on me as a senator to not replace my judgment for his, not to think of the 100 reasons I would pick somebody differently or pick a fight with Ms. Kagan.

It puts upon me a standard that stood the test of time: Is the person qualified? Is it a person of good character? Are they someone that understands the difference between being a judge and a politician? And, quite frankly, I think she's passed all those tests.

....

This is what Senator Phil Gramm (R-Texas) said about Justice Breyer:

So I'm going to vote for this nominee not because I agree with him philosophically, but because I believe he is qualified. I believe he is credible. I believe his views, though they're different than mine, are within the mainstream of thinking of his political party.

Whether I like it or not — and I do not — I do not — the American people put Bill Clinton into the White House. This nomination is a result of that. I'm not going to stand in the way of it because I differ philosophically with this nominee.

I'm going to vote for him, and that doesn't mean I'm pro-choice. I'm very pro-life. I'm going to vote for him because I believe that the last election had consequences and this president chose someone who was qualified, who has the experience and knowledge to serve on this court, who's in the mainstream of liberal philosophy and understands the difference between being a liberal judge and a politician.

At the end of the day, after the hearing, it was not a hard decision for me to make. I thought she did a very good job and she will serve this nation honorably. It would not have been someone I would have chosen, but the person who did choose, President Obama, I think chose wisely.

<http://thehill.com/blogs/congress-blog/judicial/110031-my-vote-for-kagan-says-elections-matter-sen-lindsey-graham> (posted 21 July 2010). See also Graham's speech on the floor of the Senate on 3 Aug 2010, reported in the CONGRESSIONAL RECORD at pages S6634-S6637.

Graham believed that the president was entitled to deference on the president's choice of judicial nominees, and that the Senate should consider the nominee's credentials and "good character", but *not* the nominee's political philosophy or legal philosophy. I have two comments on Graham's criteria. First, the nominee's philosophy is obviously relevant if the nominee is far from the mainstream, so that their philosophy is repugnant to most of both the majority and minority party in the U.S. Senate. For example, a white supremacist or anti-Semitic nominee should not be confirmed, because of their philosophy. Second, if Graham's criteria were applied, then there is no need for the nominee to appear at confirmation hearings, because the credentials are facts that can be proven with written evidence, and because no person should testify about their own good character.

Graham was the first of five Republicans to endorse Kagan's confirmation.

Senator Richard Lugar of Indiana on 21 July endorsed Kagan, the second Republican to endorse her.

Senator Susan Collins of Maine on 23 July became the third Republican to endorse Kagan.

Senator Olympia Snowe of Maine on 29 July became the fourth Republican to endorse Kagan.

Senator Judd Gregg of New Hampshire announced on Friday, 30 July that he would vote to confirm Kagan. He was the fifth, and last, Republican to endorse Kagan. Gregg's third term in the Senate expires in Jan 2011 and he announced in 2009 that he would not seek re-election.

Senator Ben Nelson of Nebraska announced on 30 July that he will vote against Kagan. Nelson was the only Democrat in the Senate to oppose Kagan. Ben Nelson's entire press release on his opposition to Kagan said:

As a member of the bipartisan 'Gang of 14,' I will follow our agreement that judicial nominees should be filibustered only under extraordinary circumstances. If a cloture vote is held on the nomination of Elena Kagan to the U.S. Supreme Court, I am prepared to vote for cloture and oppose a filibuster because, in my view, this nominee deserves an up or down vote in the Senate.

However, I have heard concerns from Nebraskans regarding Ms. Kagan, and her lack of a judicial record makes it difficult for me to discount the concerns raised by Nebraskans, or to reach a level of comfort that these concerns are unfounded. Therefore, I will not vote to confirm Ms. Kagan's nomination.

http://bennelson.senate.gov/press/press_releases/073010-01.cfm (30 July 2010).

Senator Nelson faces re-election in 2012. Notice that Nelson did not specify detailed objections to Kagan, but Nelson simply mentioned that his constituents in Nebraska opposed Kagan.

Scott Brown, the U.S. Senator from Massachusetts who replaced Ted Kennedy, issued the following statement on 5 Aug, the day of the vote in the Senate:

I approach the duty of voting on nominees to the United States Supreme Court with a deep sense of the constitutional responsibility of the Senate to provide its advice and consent. Elena Kagan's nomination is my first opportunity to consider a nominee to the Supreme Court. First, let me say that I have a great deal of respect for Elena Kagan. She has an impressive resume, and in my private meeting with her I found her to be brilliant, as you might expect from a former dean of Harvard Law School. However, I cannot vote to confirm Elena Kagan. The reason is simple. I believe nominees to the Supreme Court should have previously served on the bench. Lacking that, I look for many years of practical courtroom experience to compensate for the absence of prior judicial experience. In Elena Kagan's case, she is missing both. When it comes to the Supreme Court, experience matters. No classroom can substitute for the courtroom itself, where decisions are made that affect the day-to-day lives of American citizens, and where one's judicial character and temperament is shaped in favor of the fair and just application of the law. The best umpires, to use the popular analogy, must not only call balls and strikes, but also have spent enough time on the playing field to know the strike zone. Therefore, I cannot support Elena Kagan's nomination.

<http://scottbrown.senate.gov/public/index.cfm/2010/8/scott-brown-statement-on-elena-kagan-confirmation>
(5 Aug 2010).

I think Scott Brown was exactly correct. Kagan's experience was mostly in *political* advocacy in both the Clinton and Obama administrations, plus some academic research with few publications. Because Kagan worked for two presidents, I fear she will support an expansion of presidential power.

vote in the Judiciary Committee

On Tuesday, 13 July, senators returned from their 4th July holiday week and the Senate Judiciary Committee met to consider the Kagan nomination. The Republicans asked for a one-week delay, to which they are entitled under the rules. The alleged reason for the delay was to study Kagan's replies to written interrogatories submitted after the confirmation hearings, but the real reason may have been to delay the inevitable confirmation of Kagan.

On Tuesday, 20 July, the Senate Judiciary Committee again met to consider the Kagan nomination. The committee voted 13-16 to send the nomination to the Senate, with Lindsey Graham (R-SC) being the only Republican to vote for Kagan. Of course, *all* of the democrats voted to approve Kagan.

The Washington Post mentioned that two Democrats on the Senate Judiciary Committee criticized Kagan's evasive answers:

Much of the debate, however, focused not on her background but on the entire confirmation process that the committee employs for Supreme Court nominees. Kagan came under bipartisan condemnation for what the senators described as her "opaque and limited answers" and her game of "hide the ball," the latest venting by a Judiciary Committee that is increasingly frustrated by its own system for vetting the nation's most important judges.

"Too often we heard detailed explanations about the state of the law, but learned little more about what weight she would give to relevant precedent. The substance of her answers was so general at times that it would be difficult to distinguish her answers from those of any other nominee," said Sen. Herb Kohl (Wisc.), the second most senior Democrat on the panel.

....

Sen. Richard J. Durbin (D-Ill.) said the evasive answers are not surprising, echoing campaign statements that senators themselves trumpet. "This is an art form we have developed," he said.

Paul Kane, "Kagan nomination approved by Senate judiciary panel," *The Washington Post*, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072000559.html>
(13:12 EDT, 20 July 2010)

The Associated Press reported that political considerations in the November 2010 elections influenced many Republicans to vote against Kagan:

Pushing toward an election-year Supreme Court confirmation vote, a polarized Senate Judiciary Committee Tuesday approved Elena Kagan to be the fourth female justice. [9] Just one Republican joined Democrats to approve Kagan's nomination and send it to the full Senate, where she's expected to win confirmation within weeks.

....

But Kagan is likely to win fewer GOP supporters than Obama's first high court pick, Justice Sonia Sotomayor, in part because of the heightened political pressures facing senators little more than 100 days out from midterm election contests.

....

Republicans have been quicker to announce their opposition to Kagan than they were last year to Sotomayor. Graham is the only Republican so far to say he'll vote "yes." [9] Democrats attributed the difference to political considerations by the GOP. [9] "Sadly, it appears election-year politics may deprive her of the vote total that her nomination deserves," said Sen. Chuck Schumer, D-N.Y.

Julie Hirschfeld Davis, "Judiciary panel OKs Elena Kagan for Supreme Court," Associated Press <http://www.chron.com/disp/story.mpl/ap/top/all/7117221.html> (22:16 CDT, 20 July 2010).

The day after the vote in the Judiciary Committee, a nationwide opinion poll was released that showed the vulnerability of President Obama and his Democratic party. The Quinnipiac University poll of 2181 registered voters during 13-19 July showed only 44 ± 2 % approved of Obama's job performance.⁴² That result gives Republicans hope of capturing a majority of seats in the U.S. House of Representatives, then frustrating Obama's agenda during the last two years of his one-term presidency. In such a political environment, Republicans seem to oppose *everything* Obama does, including nomination of judges, as if votes were a simple choice between Good (i.e., Republican) and Evil (i.e., Democrats).

vote in the Senate

On Tuesday, 3 Aug 2010, the full U.S. Senate began "debate" on the Kagan nomination. I put "debate" in quotation marks, because nearly every senator has already decided how to vote on the nomination, and her confirmation is a fait accompli.

⁴² <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1478> (21 July 2010).

On Thursday, 5 Aug 2010, at about 15:30 EDT, the U.S. Senate voted 63 to 37 to confirm Justice Kagan.⁴³ The vote was mostly along strict party lines with all of the Democrats, except Ben Nelson, voting to confirm; and all of the Republicans except five (i.e., Graham, Lugar, Collins, Snowe, Gregg) voted against Kagan.

Kagan took the judicial oath on Saturday afternoon, 7 Aug 2010.

lack of news coverage

A story at the Politico website on 4 Aug explained the lack of news coverage of the Kagan confirmation process:

Confirmation watchers offered various explanations for the Kagan ennui. [9] Obama's solicitor general lacked the twin "firsts" that Sonia Sotomayor offered, as the first Latina nominee and President Barack Obama's first choice for the court. Kagan also lacked a pithy, controversial sound bite, like Sotomayor's "wise Latina" remark, to galvanize critics. [9] And during hearings, Kagan displayed a keen sense of humor that won over many of her conservative critics while she remained largely evasive about her legal views.

"There was none of that color or drama here," said Curt Levey of the Committee for Justice, a conservative group active in Supreme Court fights. "I don't think she allayed many of the fears conservatives had, but she was certainly more impressive in her demeanor than Sotomayor."

Josh Gerstein and Manu Raju, "Kagan avoids drama on way to court," *Politico*, <http://www.politico.com/news/stories/0810/40619.html> (04:33 EDT, 4 Aug 2010).

Also, issues of the economy (including the Senate passing an emergency measure to give \$10 billion to the states to prevent the layoffs of approximately 161,000 teachers in public schools) and the oil leak off the coast of Louisiana continued to dominate the news.

On 26 August 2010, I did an experiment to objectively compare at two leading newspapers the number of articles about Sonia Sotomayor with the number of articles about Elena Kagan, from the day of the vote in the U.S. Senate Judiciary Committee to the day they took the oath of office. I searched for articles about Sotomayor published from Tuesday, 28 July 2009 to Saturday, 8 Aug 2009, a total of 12 days. I searched for articles about Kagan published from Tuesday, 20 July 2010 to Saturday, 7 Aug 2010, a total of 19 days. I searched only for the last name of the nominee in all sections of the newspaper.

	<i>Wash.Post</i>	<i>New York Times</i>
Sotomayor	22	27
Kagan	19	21

These results show less news coverage in the *Times* for Kagan, compared with Sotomayor. Note that the period of reporting is one week longer for Kagan than for Sotomayor.

⁴³ The Senate vote was Nr. 229 in the second session of the 111th Congress.

Conclusion

One thing that should be absolutely clear is that the time to advocate a candidate for the Supreme Court is *before* the President chooses the nominee. After a person is nominated, the nominee rarely withdraws, and the Senate nearly always confirms the nominee. But the nomination process is shrouded in secrecy, making it difficult for citizens to know who is being considered. We do *not* know *why* the President chose one particular nominee and rejected the other candidates. This kind of secrecy and lack of accountability by the President strikes me as antithetical to a democracy, which is why I suggested a different process in my essay at <http://www.rbs0.com/sctjustices.pdf>. We don't know why Obama rejected Judge Wood — maybe Wood is too old (9 y older than Kagan), or maybe Obama did not want to irritate anti-abortion Senators with Wood's apparently strong belief in a woman's legal right to an abortion. The President alone selects the criteria for his nominee — no one else (neither judges, law professors, nor lawyers) has any significant input, which concentrates too much power in the President.

Most judges and law professors who are experts on constitutional law are white males. By excluding white males, President Obama has excluded *most* of the best qualified people for the U.S. Supreme Court. But even if one insists on choosing a woman, there are at least two women with markedly superior credentials to Kagan: Judge Diane Wood (p. 28) and Prof. Kathleen Sullivan (p. 36). Unfortunately, federal judicial nominations in the USA are *not* about merit, but about knowing people who can influence the President's choice of a nominee (p. 45). Since the nomination of Robert Bork in 1987, it also helps if the nominee has few publications, so the nominee is a stealth candidate with no record of opinions on controversial issues.

I believe that President Obama should have chosen a better qualified nominee than Kagan, either (a) someone who has been a judge on the U.S. Court of Appeals for at least ten years, or (b) someone with more expertise in constitutional law, such as the author of a legal textbook or treatise on constitutional law who also has substantial appellate litigation experience. Most of the people who satisfy one of these criteria are white males. But even if we only consider women, Kagan is not amongst the top three women, a group that includes Judge Diane Wood and Prof. Kathleen Sullivan.

I am particularly concerned about presidents selecting “stealth nominees” who have no — or minimal — public record on controversial issues. Selecting stealth nominees rewards ambitious people who have crafted a minimal paper trail, in order not to offend anyone. I think the role of a real intellectual is to challenge the status quo (including challenging injustices) by releasing significant new ideas that are provocative in the sense that they encourage change. So, selecting stealth nominees excludes real intellectuals, as well as excluding experienced judges with track records on controversial issues.

The mood in July 2010 seems to be that Republican activists are concerned that Kagan will be a liberal activist judge, a few liberal Democrats are concerned that Kagan is not liberal enough, and the vast majority of U.S. citizens are apathetic about the nomination and confirmation of Kagan.

This document is at **www.rbs0.com/kagan.pdf**
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