

June 2010

TO: Interested Parties
FROM: Lanae Erickson, Deputy Director of the Culture Program
RE: Four Reasons that Elena Kagan is a Moderate

As the Supreme Court confirmation hearings begin in the Senate, opponents of Solicitor General Elena Kagan's nomination will inevitably seek to portray her as an outspoken leftist ideologue. However, her record and experiences readily demonstrate that she is a moderate in the mold of Justice Sandra Day O'Connor. This memo details the key points to emphasize when talking about how Elena Kagan is a moderate.

1. She demonstrated a commitment to intellectual balance and went out of her way to boost conservative faculty presence at Harvard.

- When Kagan became dean of Harvard Law School in 2003, she inherited a faculty that was politically divided and heavily skewed to the left. She undertook the challenge of convincing liberal members of the faculty to diversify their ranks and waged a successful campaign to hire prominent conservative scholars.
- Kagan's hires included Jack Goldsmith, one of the architects of the legal foundations for the Bush administration's war on terror. Kagan said, "I'm as proud of the Goldsmith appointment as of anything I've done as dean."¹
- Her efforts to cultivate a more ideologically diverse faculty were widely recognized by academics across the political spectrum. Guy Uriel Charles, a liberal professor at Duke University, said that Kagan "pulled out all the stops and made sure that the institution hired conservatives."²
- Former Bush administration lawyer Brad Berenson said that Kagan "sent a strong signal to conservative alumni that, despite her own party affiliation, she was committed to intellectual diversity and meritocracy at [Harvard Law School], and was determined to serve the long-term best interests of the institution rather than any narrow ideological agenda."³
- Bush judicial nominee Miguel A. Estrada noted that Kagan's "tenure as Dean demonstrates that she is a uniquely gifted administrator—someone who can create consensus even in an institution that had become notorious for its fractiousness. [S]he has worked tirelessly to bring intellectual diversity to an institution that for too long had too little of it."⁴

2. She has garnered support from a wide range of conservatives and Republicans.

- Seven Republican Senators voted for Kagan’s confirmation as Solicitor General, including Senate Judiciary Committee Members Coburn (R-OK), Hatch (R-UT), and Kyl (R-AZ).
- Senator Lindsey Graham (R-SC), a leader on national security issues and a colonel in the U.S. Air Force Reserves, said he has been “generally pleased” with Kagan’s term as Solicitor General, particularly on legal issues related to terrorism.⁵
- Ken Starr and Ted Olson, who served as Solicitor General under both Presidents Bush, joined former Solicitors General from across the political spectrum in a letter endorsing Kagan for her current position, noting “the high regard in which she is held by persons with a wide variety of political and social views.”⁶
- Former Bush administration lawyer Brad Berenson wrote a letter in support of Kagan’s nomination to Solicitor General, applauding her “fair-minded consideration of competing views,” and stating that despite the fact that Kagan inevitably would “take positions in the Supreme Court in the Obama Administration with which [he would] disagree, if Dean Kagan is the solicitor general, I know they will be arrived at honestly, reasoned soundly under the law, and presented skillfully and responsibly.”⁷
- Jack Goldsmith, a former Bush administration lawyer and one of Kagan’s most controversial conservative hires at Harvard Law School, wrote that “[i]t might seem over the top to say that Kagan combines principle, pragmatism, and good judgment better than anyone [he] has ever met. But it is true.”⁸

3. She has handled difficult and divisive situations with pragmatism and evenhandedness.

- Faced with the dilemma of reconciling Harvard Law School’s nondiscrimination requirements for employers and the military’s Don’t Ask, Don’t Tell policy, Kagan forged a deliberate and careful path forward. She restricted recruiters’ access to the main career office for just a single semester, and only after an appeals court ruled that schools had a constitutional right to do so. However, she took great pains to ensure that recruiters maintained continuous access to law students through the students’ veterans group and other venues. And although only five Harvard Law School students enlisted in the military after graduation that year, that number was larger than in any other year in the decade.⁹
- At the time, other law schools across the country had filed suit against the federal government to stop enforcement of the Solomon amendment, the law that denied federal funds to law schools who refused to give the military equal access to campus recruiting programs. But Harvard Law

School, under Kagan's leadership and contrary to the wishes of a majority of the faculty, did not join that suit.

- Kagan did sign onto an *amicus* brief filed in the case, but she requested a special footnote stating that she was participating in her role as professor, not as dean.¹⁰ Moreover, she urged in the brief that the case be resolved on narrow statutory rather than constitutional grounds, arguing that schools could comply with the federal law by allowing recruiters access to students in other ways, rather than asking the court to grant the schools a broad constitutional right to bar military recruiters from campus.¹¹
- When military recruiters were present on the Harvard Law School campus, Kagan regularly sent e-mail messages to the student body supporting law students who were considering military service and reminding all students that “we distinguish between those who serve their country and the discriminatory policy under which they serve.”¹²
- An active-duty Marine Corps captain who served in Iraq prior to attending Harvard Law School stated that Kagan's personal opposition to Don't Ask, Don't Tell “never affected the services' ability to recruit at Harvard,” explaining that “[b]ehind the scenes, [Kagan] ensured that our tiny HLS Veterans Association never lacked for funds and access to facilities. ... If anything, Kagan was an activist in ensuring that military recruiters had viable access to students and facilities despite the official ban.”¹³
- After a recent meeting with Kagan, Senator Scott Brown (R-MA) said that despite having concerns about Kagan's position on military recruiting at Harvard, “[i]t was very clear to me, after we spoke about it at length, that [Kagan] is supportive of the men and women who are fighting to protect us and very supportive of the military as a whole. I do not feel that her judicial philosophy will hurt the men and women who are serving.”¹⁴

4. She has looked for common ground on other hot-button issues, including abortion and guns.

- While working as a domestic policy advisor to the Clinton administration, Kagan co-authored a memo recommending that the president support a pragmatic compromise to end a political stand-off on partial-birth abortion. The compromise would have banned late-term abortions but included a health exception that would “protect women at risk of injury.”¹⁵ Ultimately, the compromise failed, and the Republican Congress passed a stricter version of the law—one that did not include a health exception—which President Clinton vetoed. But the Supreme Court went on to validate Kagan's interpretation of then-current law in 2000, when Justice O'Connor reiterated that laws banning late term abortions must include a health exception.
- Kagan's desire to find common ground on the abortion issue was also reflected in a 1998 memo regarding the use of Medicare funds to provide

abortions to women whose health was at risk. Kagan recommended only authorizing use of the funds to cover cases of rape, incest, and danger to the woman's life, stating that "it is most consistent with this administration's prior practice on government funding of abortions."¹⁶

- Kagan has also taken a common ground, moderate position on guns—staunchly defending the Second Amendment but recognizing that guns rights don't extend to terrorists, criminals, and military weapons. During her time in the Clinton administration, Kagan supported reasonable, mainstream gun laws like the Brady Law, which required a criminal background check prior to purchase of a firearm, and proposals to close the gun show loophole and the loopholes on importation and purchase of assault weapons.
- These reasonable regulations had broad, bipartisan support. For example, the Brady Law was endorsed by Ronald Reagan and nearly every major law enforcement organization in the country, and it was named after Reagan's press secretary, Jim Brady. And supporters of closing the assault weapons loophole included conservative House Republicans Henry Hyde, Bob Michel, Bill Young, Tom Ridge, and Harris Fawell, and conservative Senate Republicans Hank Brown, Pat Burns, Dan Coats, and Dick Lugar. Closing the gun show loophole is so mainstream that members from as wide a spectrum as Dick Armey to Ted Kennedy supported legislation to close it. In fact, in 2004, Senator John McCain authored his own gun show loophole legislation, which passed 53-46 with eight GOP votes.
- At her Solicitor General confirmation hearings, Kagan described the Supreme Court's *Heller* (Second Amendment) decision as settled law, stating that "the right to bear arms should be understood like any other constitutional right . . . as providing strong but not unlimited protection." Kagan's viewpoint on this issue is shared by Justice Scalia, who said in his majority opinion in *Heller*, "Like most rights, the right secured by the Second Amendment is not unlimited." He went on to say, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."
- Even conservative author Dick Morris has said that within the Clinton White House, Kagan "was a moderate and conservative . . . she would be a moderate on the court. She'd be a little bit like Sandra Day O'Connor."¹⁷

Endnotes

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⁵ Office of Senator Lindsey Graham. *Graham on Kagan Nomination. United States Senator Lindsey Graham, South Carolina*. 10 May 2010. Web. 27 May 2010. Available at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=831144bc-802a-23ad-4cf2-f2e21c66e0bc.

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⁸ Goldsmith, Jack L. Letter to Senator Patrick Leahy and Senator Arlen Specter. 23 Jan. 2009. *United States Senate Committee on the Judiciary*. Web. 27 May 2010. Available at <http://www.appellatestrategist.com/uploads/file/Kagan-Letters.pdf#page=15>.

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