

# WebMemo



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## Key Questions for Elena Kagan

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Before being confirmed to the United States Supreme Court, Elena Kagan must first be confirmed by the U.S. Senate. But before Kagan can be confirmed to this lifetime appointment, she has to answer questions before the Senate Judiciary Committee.

Kagan comes to the committee with one of the thinnest records of any Supreme Court nominee in recent history. She has no judicial experience, a scarce number of academic writings, and virtually no litigation experience prior to her current post as Solicitor General. For these reasons, it is critical that Kagan answer questions about disturbing issues in her record. If Senators are to determine whether she should be confirmed for an appointment where she could very well shape the law for decades to come, there are several questions Kagan should answer—and answer fully.

**Gun Rights and Wrongs.** As a law clerk to Justice Thurgood Marshall, Elena Kagan recommended that the Court not even hear a claim that the District of Columbia's complete ban on handguns violates the Second Amendment—a claim that recently succeeded at the Court. The sole reasoning that she provided for denying the claim: "I'm not sympathetic." After giving such short shrift to an enumerated right, Kagan was intimately involved in gun-control policies in the Clinton White House, working to reclassify certain hunting rifles as assault weapons and to ban their importation. In Kagan's notes obtained from the Clinton Library, she even lumped the National Rifle Association together with the KKK as "bad guy org[anization]s."

*Do you stand by your recommendation to reject access to the Supreme Court to someone denied his or her Second Amendment rights by a complete ban on handguns? You have previously said that the government can ban political pamphlets—do you believe that the Constitution permits the government to ban all guns as well?*

**Discrimination Against Military Recruiters During Wartime.** As dean of Harvard Law School, Kagan restricted military recruiters' access to campus. Kagan's actions, which were based upon a court of appeals decision that did not even apply to Harvard, violated the Solomon Amendment. The court of appeals decision was subsequently prevented from going into effect even for the schools to which it did apply while the Supreme Court heard the case. Kagan, however, continued to refuse to permit ordinary campus access to military recruiters, access mandated by law.

Furthermore, Kagan even joined a brief before the Supreme Court arguing that Harvard should be able to keep military recruiters off campus but still receive federal funding. The position was unanimously rejected. It was only after the Department of Defense threatened to cut off Harvard's funding that Kagan granted military recruiters customary access to campus.

This paper, in its entirety, can be found at:  
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*What legal authority did you have to disregard the Solomon Amendment and restrict the access of military recruiters to campus? Do you think it was appropriate to limit the ability of the military to recruit on campus at a time when the United States is fighting two wars?*

**Obama's Empathy Standard.** President Obama has infamously stated that he would seek judges who would decide cases based upon their empathy for the parties involved, thereby elevating personal feelings above the rule of law. Elena Kagan has endorsed a similar approach, praising Justice Marshall's view that the Supreme Court exists primarily to assist the despised and disadvantaged as a "thing of glory."

But who are the despised and disadvantaged? Americans have already seen how subjective and dangerous this standard can be in the case of another Obama judicial nominee, Robert Chatigny. Judge Chatigny seemed to think that the Roadside Strangler, who had admitted to the brutal rape and murder of eight women, was despised and disadvantaged.

Chatigny believed the Strangler was the least culpable of anyone on death row. Why? Because he thought the killer's sexual sadism should be considered a mitigating factor—i.e., the fact that the Strangler was driven by excitement at the suffering of his victims somehow made him less culpable for the lives he took. Judge Chatigny's excesses are clear warning for those who would elevate subjective empathy above the rule of law.

*Do you believe that judges should be guided by empathy or favoritism toward the despised and disadvantaged? Do you agree with Obama's empathy standard? Do you believe that a judge can apply Obama's empathy standard and still adhere to the judicial oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich"?*

**First Amendment.** In arguments before the Supreme Court, Kagan asserted that government could ban political pamphlets. The core of the First Amendment is the protection of political speech. So not only does such a position therefore violate common sense, but its logic could be used to ban Thomas Paine's *Common Sense* or other landmark political treatises, particularly if their authors were

so foolish as to publish them through a non-profit corporation.

*Do you believe that the First Amendment permits the government to ban pamphlets and books? If not, why would you argue this before the United States Supreme Court?*

**Foreign Law.** In a letter to Senator Arlen Specter (D-PA) during her Solicitor General confirmation hearings, Kagan wrote, "There are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions," such as the Eighth Amendment. This position seems consistent with Kagan's approach as dean of Harvard Law School, where she led the effort to change the first-year curricula to mandate the study of international law while maintaining constitutional law as an elective course.

In recent years, the Supreme Court has frequently looked to foreign law to justify decisions that contradicted established precedent or rested on tenuous legal foundations. This practice of looking at foreign law to change U.S. law raises grave questions about U.S. sovereignty and is frequently used selectively by justices who cite to practices that favor their desired outcomes.

*As a justice, will you cite to foreign law in interpreting the United States Constitution?*

**The Kagan Standard.** In a 1995 book review, Kagan argued in favor of "the essential rightness—the legitimacy and the desirability—of exploring a Supreme Court nominee's set of constitutional views and commitments." Kagan lamented the "vacuity and farce" of the post-Bork confirmation hearings, in which nominees refused to answer any questions of substance. And she suggested that nominees with less substantial paper trails would face a more substantial burden—there would be more required testimony—to allow Senators to understand how they approach complex constitutional issues.

*Do you still adhere to the Kagan standard? If not, why are you abandoning it? Shouldn't the Senate hold you to a higher burden—shouldn't they require you to be more forthcoming—given your lack of a substantial paper trail, your lack of any judicial experience, your*

*paltry academic writings, and your sparse litigation experience?*

**A Heavier Burden.** These are but a few of the questions that must be answered, and answered fully, in order for Senators to assess whether Elena Kagan can put aside her personal preferences, apply the law as it is written, and dispense justice without regard to the parties before her. Kagan was cor-

rect in suggesting that the burden is heavier when a nominee comes before the Judiciary Committee with a less substantial paper trail. The Senate must hold her to that burden and demand genuine answers.

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