

Kagan Will Move the Supreme Court to the Right

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President Barack Obama has chosen Elena Kagan to fill the vacancy left by Justice John Paul Stevens' retirement. Sadly, Kagan cannot fill Justice Stevens' mighty shoes.

As the Rehnquist court continued to eviscerate the right of the people to be free from unreasonable searches and seizures, Associate Justice John Paul Stevens filed principled and courageous dissents. For example, the majority held in the 1991 case of *California v. Acevedo* that although the police cannot search a closed container without a warrant, they can wait until a person puts the container into a car and then do a warrantless search because the container is now mobile. In a ringing dissent that exemplified his revulsion at executive overreaching, Justice Stevens wrote that "decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."

The founders wrote checks and balances into the Constitution so that no one branch would become too powerful. But during his "war on terror," President George W. Bush claimed nearly unbridled executive power to hold non-citizens indefinitely without an opportunity to challenge their detention and to deny them due process. Three times, a closely divided Supreme Court put on the brakes. Justice Stevens played a critical role in each of those decisions. He wrote the opinions in *Rasul v. Bush* and *Hamdan v. Rumsfeld* and his fingerprints were all over *Boumediene v. Bush*.

Unfortunately, President Barack Obama has continued to assert many of Bush's executive policies in his "war on terror." Elena Kagan, Obama's choice to replace Justice Stevens, has never been a judge. But she has been a loyal foot soldier in Obama's fight against terrorism and there is little reason to believe that she will not continue to do so. During her confirmation hearing for solicitor general, Kagan agreed with Senator Lindsey Graham that the president can hold suspected terrorists indefinitely during wartime, and the entire world is a battlefield. While Bush was shredding the Constitution with his unprecedented assertions of executive power, law professors throughout the country voiced strong objections. Kagan remained silent.

Justice Stevens ruled in favor of broad enforcement of our civil rights laws. In his 2007 dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, he wrote that "children of all races benefit from integrated classrooms and playgrounds." When Kagan was dean of Harvard Law School, she hired 32 tenured and tenure-track academic faculty members. Only seven were women and only one was a minority. "What a twist of fate," wrote four minority law professors on *Salon.com*, "if the first black president – of both the Harvard Law Review and the United States of America – seemed to be untroubled by a 21st Century Harvard faculty that hired largely white men."

Obama had a golden opportunity to appoint a giant of a justice who could take on the extreme right-wingers on the Court who rule consistently against equality and for corporate power. When he cast a vote against the confirmation of John Roberts to be Chief Justice, Senator Obama said, “he has far more often used his formidable skills on behalf of the strong and in opposition to the weak.” Justice Stevens has done just the opposite.

If he wanted to choose a non-judge, Obama could have picked Harold Hongju Koh or Erwin Chemerinsky, both brilliant and courageous legal scholars who champion human rights and civil rights over corporate and executive power. Unlike Kagan, whose 20 years as a law professor produced a paucity of legal scholarship, Koh and Chemerinsky both have a formidable body of work that is widely cited by judges and scholars.

But Obama took the cautious route and nominated Kagan, who, like Harriet Miers, has no record of judicial opinions and no formidable legal writings. Since Kagan was handily confirmed as solicitor general, Obama probably thinks her confirmation will go smoothly. After the health care debacle, however, he should know that the right-wingers will not be appeased by this milk toast appointment, but will oppose whomever he nominates.

The Warren Court issued several landmark decisions. It sought to remedy the inequality between the races and between rich and poor, and to curb unchecked executive power. Chief Justice Earl Warren wrote these words, which would later become his epitaph: “Where there is injustice, we should correct it. Where there is poverty, we should eliminate it. Where there is corruption, we should stamp it out. Where there is violence, we should punish it. Where there is neglect, we should provide care. Where there is war, we should restore peace. And wherever corrections are achieved, we should add them permanently to our storehouse of treasures.”

Conservatives decry activist judges – primarily those who act contrary to conservative politics. But the Constitution is a short document and it is up to judges to interpret it. Obama has defensively bought into the right-wing rhetoric, saying recently that during the 1960’s and 1970’s, “liberals were guilty” of the “error” of being activist judges. Rather than celebrating the historic achievements of the Warren Court – and of Justice Stevens – Obama is once again cowering in the face of conservative opposition.

Obama should have done the right thing, the courageous thing, and filled Justice Stevens’ seat with someone who can fill his shoes. His nomination of Elena Kagan will move the delicately balanced court to the Right. And that is not the right thing.

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