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## Parsing the Kagan nomination



Professor Wendy Parmet discusses Elena Kagan  
photo by Lauren McFalls

May 11, 2010

For the second time in the Obama administration, a Supreme Court justice is stepping down. The president has named his solicitor general, Elena Kagan, to succeed John Paul Stevens on the court. If successfully confirmed, Kagan would be the youngest serving justice, the fourth woman to serve and the third female justice currently serving on the nine-member court. Kagan, who was the first woman dean of Harvard Law School, is widely admired for her knowledge of the law. But with no judicial experience, she is expected to face tough questioning at her Senate confirmation hearing. In this Q&A, Northeastern law professor Wendy Parmet discusses some of the issues that are likely to arise.

### How does Kagan's perceived ideological slant compare with the justice she would be replacing, John Paul Stevens?

Kagan is widely believed to be a moderate, perhaps less liberal than Justice Stevens. But we really cannot know for sure how Kagan will rule once she is on the court. That is in part because she has not taken public positions on many issues and in part because the views of many justices evolve once they are on the court. Certainly Justice Stevens is viewed as more liberal today than he was when he was nominated.

### Some very important administration priorities such as health care reform and new regulations in the financial industry are expected to come before the Supreme Court. Given Kagan's experience as solicitor general, will she have to recuse herself from many cases?

If she is confirmed, Kagan will likely recuse herself from cases in which she had personal involvement while she was solicitor general. In that role, however, she probably has not been involved in the discussions about the regulation of the financial industry. It is also unlikely that she has been involved in the litigation around health reform, because those cases are still at their earliest stages, before the solicitor general would typically become involved. I would expect that senators would ask her views about recusal during her confirmation hearings, though it is not apt to be a major issue.

### Justice Sonia Sotomayor was nominated for her depth of judicial experience. Elena Kagan has no judicial experience. How will this factor into the debate on her confirmation?

It can help and hurt her. In recent years, we've become used to having Supreme Court nominees with judicial experience. Critics will certainly point to her lack of court experience to question her qualifications.

On the other hand, many Supreme Court-watchers have long been saying that the court could benefit from a justice with a different career path. Many of our great justices had not been judges before going on the Supreme Court. And the fact that she wasn't a judge means that she hasn't written a lot of opinions that critics can pick apart.

### Although Kagan is female, critics say she adds little diversity to the court since she is Ivy League-educated, is from New York, and is Jewish, which would leave the court without a Protestant justice for the first time in history. Is the kind of diversity that Kagan lacks important to the court's decision-making?

There is some validity to that criticism. Not only will the court lack a Protestant, if Kagan is confirmed, the justices will all share an Ivy League education. As the court increasingly draws from parts of our population that

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had in the past been excluded, it risks suffering from different forms of parochialism.

**Is there a controversial issue from Kagan's past that will seriously impact her chance of successful confirmation?**

Probably the most controversial issue is her support, while dean of Harvard Law School, of the school's decision to bar military recruiters from the campus due to the armed forces' "don't ask, don't tell" policy regarding gays and lesbians. Kagan joined many deans from law schools around the country challenging a law that required universities to open their campus to military recruiters. Ultimately, the Supreme Court rejected that challenge.

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