

...in which I become petty and backbiting — sort of | 1



Could [this](#) be true?

University of Colorado law professor Paul Campos notes in *The New Republic* that Solicitor General Elena Kagan, former Harvard Law School dean and [current front-runner](#) to succeed John Paul Stevens

has published very little: three scholarly articles, two shorter essays, two brief book reviews, and two other minor pieces. Compare [this record](#) to those of the three other law professors most commonly mentioned as potential replacements for Justice John Paul Stevens: Stanford Law professor [Pamela Karlan](#) and [Harold Koh](#), who became Yale Law's dean in 2004, each have more than 100, and Kagan's Harvard colleague [Cass Sunstein](#), who also works for the Obama administration, has several hundred, including more than 20 books.

I checked, and Campos is right: Kagan's scholarly record is quite minimal. Her most recent article, [Presidential Administration](#), is a good, solid piece of work, and something I would have been proud to have written. Still, its major argument — that presidential direction of administrative agencies can foster regulation if the President himself is pro-regulation — is hardly earth-shattering.

All of which shows why Kagan might be the best choice for the court.

Consider that Kagan first got tenure at the University of Chicago based on two articles — which usually is what that notoriously demanding faculty wants in *one year* from a junior

...in which I become petty and backbiting — sort of | 2

professor. Then she got an academic chair at Harvard based on one more piece, *Presidential Administration*. She wrote nothing else for more than two years at Harvard. And then she was appointed Dean.

This shows that Kagan may not be a great scholar, but she is enormously skilled at impressing older colleagues — and that's just what the doctor ordered for this appointment.

Essentially, any Supreme Court appointment this cycle has two tasks: 1) vote the right way; and 2) convince Anthony Kennedy to do the same. Kagan seems to have the skills to do that.

Indeed, if you think about it, those justices with the greatest scholarly credentials have not generally been thought of as effective concerning the Court's internal politics. Holmes and Brandeis were essentially isolated dissenters. [As Richard Lazarus has demonstrated](#), Antonin Scalia has consistently undermines his own authority within the Court by insisting on his own theories of things. It is people like Earl Warren, William Brennan, John Marshall, and John Paul Stevens, who were plenty smart but not infatuated with their own jurisprudential theories, who got things done.

Barack Obama is a student of the Court. I think he understands this history. And it's why he's leaning toward Kagan.