

CORRECTING THE RECORD: ELENA KAGAN'S SUPREME COURT CLERKSHIP REQUIRED HER TO "CHANNEL" JUSTICE MARSHALL, A RESPECTED LEGAL GIANT

RHETORIC: Critics argue that Elena Kagan's work as a law clerk to Justice Marshall demonstrates that she embraced an activist and results-oriented approach to the law.

Elena Kagan: In Her Own Words

"When I was clerking for Justice Marshall, I was 27-years-old, and Justice Marshall was an 80-year-old icon, a lion of the law. ... **[T]he role of the clerks was to channel Justice Marshall** to try to figure out whether Justice Marshall would want to take a case, whether Justice Marshall would think that the case is an appropriate one, and that's what I did."

"...I love Justice Marshall; he did an enormous amount for me. **If you confirm me you will get Justice Kagan.**" (Elena Kagan, June 29, 2010)

When confronted with memos he wrote as a law clerk to Justice Jackson, former Chief Justice Rehnquist asserted that the memos were merely a tentative statement of Jackson's viewpoints.

FACT: Former Chief Justice Rehnquist was criticized for a 1952 memo he wrote as a law clerk to Justice Robert Jackson in which he urged the Justice to use his decision in *Brown v. Board of Education* to uphold segregation in public schools. At his nomination hearing, Rehnquist said "that **the memorandum was prepared by me as a statement of Justice Jackson's tentative views.**" (NPR, June 10, 2010)

Former Supreme Court clerks who worked with Elena Kagan recognize that her job as a law clerk was to serve Justice Marshall—not advance her own opinions.

FACT: Twenty-nine former law clerks who served on the Supreme Court at the same time as Elena Kagan wrote to the Committee to explain the role of law clerks. "We all understood...that **our role as clerks was to serve the Justice, not to seek to impose our personal views...** [E]ach of us attempted to be **mindful of our individual Justice's approach to legal questions**, and we believe **Elena did as well.**" (Letter to Senators Leahy and Sessions, June 23, 2010)

Justice Marshall is a giant of the civil rights movement who commands the respect of conservatives and liberals alike.

FACT: Justice Marshall, who dedicated his career to the pursuit of fairness and equality for all, won the respect of conservatives and liberals alike. **President Clinton awarded him a posthumous Presidential Medal of Freedom**, the highest honor the United States gives to civilians. In addition:

- Senator Orrin Hatch described his "**respect and reverence**" for Justice Marshall "**as a human being and a judge**" (Press conference, June 27, 1991); and
- Justice Scalia said, that Justice Marshall "**could be . . . a persuasive force by just sitting there . . .** He was always in the conference a visible representation of a past that we wanted to get away from and you knew that, as a private lawyer, he **had done so much to undo racism** or at least its manifestation in and through government" (*Booknotes*, Oct. 11, 1998);
- Justice Thomas during his confirmation hearing praised Justice Marshall as "**one of the great architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in the Pin Point, Georgias of the world.**" (Confirmation Hearing, p. 109)

FACT: As a lawyer, Justice Marshall spent decades working to end segregation—an effort that culminated in his **historic victory in *Brown v. Board of Education***. Our nation's **first African American justice**, he served on the Supreme Court for 4 years. He was also our **first African American Solicitor General** and the **first African American to sit on the Second Circuit**.