

WITH KAGAN ON SCOTUS, WE ARE STILL DOWN A JUSTICE

✘ With the long anticipated retirement of Justice John Paul Stevens, it was important for President Obama to appoint and get confirmed a new justice so there would not only be a full compliment of justices on the court, but to insure the ideological balance of the court was maintained. By selecting Elena Kagan, Obama certainly did not pick the most qualified person for the job, nor did he maintain the ideological balance particularly as Kagan undoubtedly moved the court to the right at least to some degree.

Now, it turns out, by appointing Kagan Obama did not even give the Court a full compliment of justices. From the Blog of Legal Times:

Supreme Court Justice Elena Kagan this week quietly recused herself in 10 cases that will be argued in the term beginning Oct. 4, bringing to 21 the number of cases in which she will not participate.

That represents more than half of the 40 cases the Court has already agreed to hear in the new term – a number that will grow in coming months as the justices agree to hear arguments in more new cases.

During her confirmation this summer, Kagan already indicated she would recuse in 11 cases in which she was counsel of record as solicitor general. The new batch appears to reflect a determination that her participation at earlier stages – even where her office did not file a brief – required her to step aside.

So, as it stands today, Kagan will not be participating in over half the cases on the

Supreme Court docket for the coming term. Lovely. A full list of the cases Justice Kagan has recused on to date can be found at the BLT link.

What is more distressing, however, are the cases to come that Kagan will also undoubtedly be recusing on. For instance the *al-Haramain*, *Jeppesen* and *Jewel* cases from the 9th Circuit. There are a whole plethora of Executive/Unitary power, Habeas, Gitmo, Detainee and other critical war on terror cases Kagan either did have, or may have had, her fingers on as head of the Solicitor General's office. At this point, it looks like she plans on recusing herself from anything and everything that was in her vicinity, no matter how nominally. As should be well known by now, there is no necessity for a justice to recuse from everything they have ever known about, no less an authority than Antonin Scalia proved that.

Now, quite frankly, I have no problem with Elena Kagan recusing from consideration of Vaughn Walker's decision in *al-Haramain*, I think the case would be better off without her toadying for the Obama Administration's view of supreme Executive power and covering of crimes through assertion of state secrets, but what about the Prop 8 *Perry v. Schwarzenegger* case? In case you have forgotten, a portion of that case (the cameras in the court issue) went to the Supreme Court; if Elena Kagan decides she has to recuse herself, or is looking for an excuse to avoid such a controversial matter, that is going to be a HUGE blow to the chances of success on appeal.

I wonder how many people really understood they would be getting a part time justice for such a critical period over the next couple of years? And for all those on the liberal end of the political spectrum that carped about the fundamental dishonesty of John Roberts when he swore he was just a "balls and strikes" kind of guy "respectful of precedent", I wonder what they think of the same type of deception from Kagan when she ridiculously understated the

depth of her anticipated recusal problem to the Judiciary Committee?

There were a lot of things needed from President Obama's choice to fill the seat of Justice John Paul Stevens; none of them have been fulfilled so far by Elena Kagan.