

ELENA KAGAN VOTES WITH ALITO AND THOMAS TO UNDERMINE MIRANDA

When Elena Kagan was nominated, there were very few of us voicing strenuous objection, one of the primary reasons I did was her complete lack of experience in the adversarial system, especially with her total lack of knowledge and interest in criminal process issues, which would be critical in the face of the Obama DOJ's determination to further gut *Miranda*.

The feared Kagan chickens have come home to roost. The Supreme Court just announced its decision in *Howes v. Fields*, and the decision is a significant further erosion of the critical Constitutional protections embodied in *Miranda*. The ruling specifically holds that police are not automatically required to tell prisoners of their legal right to remain silent and have an attorney present when being questioned in prison about another crime.

Ruth Bader Ginsburg, joined by Justices Sonia Sotomayor and Stephen Breyer dissented. Noting that *Fields* was only incarcerated for disorderly conduct in the first place, Ginsburg stated:

For the reasons stated, I would hold that the “incommunicado interrogation [of *Fields*] in a police-dominated atmosphere,” *id.*, at 445, without informing him of his rights, dishonored the Fifth Amendment privilege *Miranda* was designed to safeguard.

Notice who did NOT side with her fellow “liberal bloc” Justices to honor and protect *Miranda*? Elena Kagan. No, Kagan instead sided completely with Clarence Thomas, Samuel Alito and the rest of the conservative bloc.

No democratic appointee to Supreme Court should ever vote to further erode *Miranda*, and this case did exactly that in a fundamental way. But Barack Obama gave us the authoritarian Elena Kagan who, predictably, did just that. As a prediction: you will be seeing a lot more of Elena Kagan voting with Alito, Scalia and Thomas on crucial law and order/criminal process, not to mention evidentiary, issues. Get used to it.

Oh, and as a reminder, Obama may soon enough have the opportunity to further shove the ideological spectrum of the Supreme Court substantially to the right, just as he did when he replaced John Paul Stevens with Kagan. If Obama replaces the liberal stalwart Ruth Bader Ginsburg with another mushy authoritarian and/or corporatist centrist, like he did in replacing Stevens, liberals will regret it for decades.

Judicial policy matters.

[updated slightly to reflect authoritarian as a descriptor for Kagan, which, as EW points out, is more germane to this discussion on *Howes*]