Kagan Nomination Leaves Longing on the Left

By PETER BAKER

WASHINGTON — The selection of Solicitor General Elena Kagan to be the nation’s 112th justice extends a quarter-century pattern in which Republican presidents generally install strong conservatives on the Supreme Court while Democratic presidents pick candidates who often disappoint their liberal base.

Ms. Kagan is certainly too liberal for conservatives, who quickly criticized her nomination on Monday as a radical threat. But much like every other Democratic nominee since the 1960s, she does not fit the profile sought by the left, which hungers for a full-throated counterweight to the court’s conservative leader, Justice Antonin Scalia.

In many ways, this reflects how much the nation’s long war over the judiciary has evolved since Ms. Kagan was a child. While the American left back then used the Supreme Court to promote social change in areas like religion, race and abortion, today it looks at it more as a backstop to defend those rulings. The right, on the other hand, remains aggrieved and has waged an energetic campaign to make the court an agent of change reversing some of those holdings.

Along the way, conservatives have largely succeeded in framing the debate, putting liberals on the defensive. Sonia Sotomayor echoed conservatives in her Supreme Court confirmation hearings last year by rejecting the idea of a “living” Constitution that evolves, and even President Obama recently said the court had gone too far in the past. While conservatives have played a powerful role in influencing Republican nominations, liberals have not been as potent in Democratic selections.

In that vein, then, no Democratic nominee since Thurgood Marshall in 1967 has been the sort of outspoken liberal champion that the left craves, while Justice Scalia has been joined by three other solid conservatives in Chief Justice John G. Roberts Jr. and Justices Clarence Thomas and Samuel A. Alito Jr. By all accounts, Mr. Obama did not even consider the candidates
favored most by the left, like Harold Hongju Koh, his State Department legal adviser, or Pamela S. Karlan, a Stanford Law School professor.

“Why do the conservatives always get the conservatives, but we don’t get to get the liberals?” Senator Tom Harkin, Democrat of Iowa, asked the Web site Politico recently, voicing the frustration of the left when Ms. Kagan was considered a front-runner but was not yet Mr. Obama’s selection. “What the hell is that all about?”

Ms. Kagan addressed the point herself 15 years ago in the University of Chicago Law Review: “Herein lies one of the mysteries of modern confirmation politics: given that the Republican Party has an ambitious judicial agenda and the Democratic Party has next to none, why is the former labeled the party of judicial restraint and the latter the party of judicial activism?”

Conservatives reject the notion that what they seek amounts to activism, saying they want justices who do not interpret the Constitution and laws to promote a policy agenda. But they said the public has come around to their view that the courts have overreached, and they have made the issue a potential liability for Democrats.

“What does President Obama gain by putting forward an unabashed progressive, liberal judicial activist?” asked Leonard A. Leo, a conservative leader who helped President George W. Bush confirm Chief Justice Roberts and Justice Alito. “Polling suggests that’s not something that adds a lot of value to his own immediate political objectives.”

The ground began shifting on Supreme Court politics in President Ronald Reagan’s second term when conservatives pushed for candidates who would reverse what they saw as the excesses of the court under Chief Justices Earl Warren and Warren E. Burger.

In 1986, Mr. Reagan appointed Justice Scalia and elevated Justice William H. Rehnquist to replace Chief Justice Burger. But Mr. Reagan’s nomination of Robert H. Bork a year later was rejected by the Senate after an ideological clash. Only after that vote and another nominee withdrew did Mr. Reagan finally pick Anthony M. Kennedy, a more moderate conservative.

Leery of another such showdown, President George Bush picked a so-called stealth candidate in David H. Souter in 1990, a move conservatives considered a betrayal after he turned out to be more liberal than expected. A year later, Mr. Bush appointed Justice Thomas, who was a favorite of the right, as were the second President Bush’s choices, Chief Justice Roberts and Justice Alito. The 2005 nomination of Harriet E. Miers, on the other hand, collapsed amid a revolt by conservatives who feared another Justice Souter.

Liberals have had Scalia envy for nearly a quarter-century, only to be let down. They considered
President Bill Clinton’s selections of Ruth Bader Ginsburg and Stephen G. Breyer to be satisfactory but not satisfying, much like the nomination of Sonia Sotomayor last year. While Justice Ginsburg came closest to what they were looking for, given her record of advocacy for women’s rights, she does not go far enough for them on capital punishment and other issues.

Richard Primus, a professor at the University of Michigan Law School, said conservatives did more to influence Republican nominations because the energy on court advocacy is on the right, which still resents rulings that barred school-sponsored prayer, legalized abortion and upheld some affirmative action programs. “It still lives off of that anger, and nothing of that sort of fire has really taken hold on the other side,” Professor Primus said.

The left, by contrast, focuses on guarding the status quo, a less animating mission. “The quote-unquote liberals are defending the New Deal and Warren court inheritances,” said Bruce Ackerman, a constitutional scholar at Yale Law School.

A 2009 study provided some fodder for Mr. Harkin’s argument that today’s conservative justices lean more to the right than the liberals lean to the left.

Richard A. Posner, a conservative appeals court judge in Chicago, and William M. Landes, his colleague from the University of Chicago law school, ranked all 43 justices from 1937 to 2006 by ideology and found that four of the five most conservative ones are on the current court. Even the moderate swing vote, Justice Kennedy, was the 10th most conservative over that period. By contrast, none of the current justices ranks among the five most liberal members, and only Justice Ginsburg is in the top 10.

Where exactly Ms. Kagan would fall on that scale is unclear since she has never been a judge. She has been a forceful critic of the ban on openly gay men and lesbians serving in the military, but has argued for strong executive power, a hot issue since the Sept. 11 attacks. Some analysts even say Ms. Kagan would actually shift the court somewhat to the right when compared with Justice John Paul Stevens.

Ronald A. Klain, chief of staff to Vice President Joseph R. Biden Jr. and a longtime friend, said “she is more of the progressive mold than not” but has a “pragmatic lawyer’s approach to legal questions.”

Mr. Leo said he assumed she would be a reliable liberal but not a Scalia for the left. “Kagan’s probably a vote,” he said, “but probably not the full package.”