Obama Picks Kagan as Justice Nominee

By PETER BAKER and JEFF ZELENY

WASHINGTON — President Obama nominated Solicitor General Elena Kagan as the nation’s 112th justice, choosing his own chief advocate before the Supreme Court to join it in ruling on cases critical to his view of the country’s future.

After a monthlong search, Mr. Obama informed Ms. Kagan and his advisers on Sunday of his choice to succeed the retiring Justice John Paul Stevens.

In settling on Ms. Kagan, the president chose a well-regarded 50-year-old lawyer who served as a staff member in all three branches of government and was the first woman to be dean of Harvard Law School. If confirmed, she would be the youngest member and the third woman on the current court, but the first justice in nearly four decades without any prior judicial experience.

That lack of time on the bench may both help and hurt her confirmation prospects, allowing critics to question whether she is truly qualified while denying them a lengthy judicial paper trail filled with ammunition for attacks. As solicitor general, Ms. Kagan has represented the government before the Supreme Court for the past year, but her own views are to a large extent a matter of supposition.

Perhaps as a result, some on both sides of the ideological aisle are suspicious of her. Liberals dislike her support for strong executive power and her outreach to conservatives while running the law school. Activists on the right have attacked her for briefly barring military recruiters from a campus facility because the ban on openly gay men and lesbians serving in the military violated the school’s anti-discrimination policy.

Replacing Justice Stevens with Ms. Kagan presumably would not alter the broad ideological balance on the court, but her relative youth means that she could have an influence on the court for decades to come, underscoring the stakes involved.
In making his second nomination in as many years, Mr. Obama was not looking for a liberal firebrand as much as a persuasive leader who could attract the swing vote of Justice Anthony M. Kennedy and counter what the president sees as the rightward direction of the court under Chief Justice John G. Roberts Jr. Particularly since the Citizens United decision invalidating on free speech grounds the restrictions on corporate spending in elections, Mr. Obama has publicly criticized the court, even during his State of the Union address with justices in the audience.

As he presses an ambitious agenda expanding the reach of government, Mr. Obama has come to worry that a conservative Supreme Court could become an obstacle down the road, aides said. It is conceivable that the Roberts court could eventually hear challenges to aspects of Mr. Obama’s health care program or to other policies like restrictions on carbon emissions and counterterrorism practices.

Critics have been pre-emptively attacking her in the days leading up to the president’s announcement. Paul Campos, a law professor at the University of Colorado, Boulder, writing on The Daily Beast, compared her to Harriet E. Miers, whose nomination by President George W. Bush collapsed amid an uprising among conservatives who considered her unqualified and not demonstrably committed to their judicial philosophy.

M. Edward Whelan III, president of the Ethics and Public Policy Center in Washington, wrote on National Review’s Web site that even Ms. Kagan’s nonjudicial experience was inadequate. “Kagan may well have less experience relevant to the work of being a justice than any entering justice in decades,” Mr. Whelan wrote.

Ms. Kagan defended her experience during confirmation hearings as solicitor general last year. “I bring up a lifetime of learning and study of the law, and particularly of the constitutional and administrative law issues that form the core of the court’s docket,” she testified. “I think I bring up some of the communications skills that has made me — I’m just going to say it — a famously excellent teacher.”

Ms. Kagan was one of Mr. Obama’s runners-up last year when he nominated Sonia Sotomayor to the court, and she was always considered the front-runner this year. The president also interviewed three other candidates, all federal appeals court judges: Merrick B. Garland of Washington, Diane P. Wood of Chicago and Sidney R. Thomas of Montana.

Ms. Kagan had several advantages from the beginning that made her the most obvious choice. For one, she works for Mr. Obama, who has been impressed with her intelligence and legal capacity, aides said, and she worked for Vice President Joseph R. Biden Jr. when he was a senator. For another, she is the youngest of the four finalists, meaning she would most likely have the longest tenure as a justice.
Ms. Kagan was also confirmed by the Senate just last year, albeit with 31 no votes, making it harder for Republicans who voted for her in 2009 to vote against her in 2010.

The president can also say he reached beyond the so-called “judicial monastery,” although picking a solicitor general and former Harvard law dean hardly reaches outside the Ivy League, East Coast legal elite. And her confirmation would allow Mr. Obama to build on his appointment of Justice Sotomayor by bringing the number of women on the court to its highest ever (three, with Justice Sotomayor and Justice Ruth Bader Ginsburg).

Moreover, in his selection of finalists, Mr. Obama effectively framed the choice so that he could seemingly take the middle road by picking Ms. Kagan, who correctly or not was viewed as ideologically between Judge Wood on the left and Judge Garland in the center.

Judge Garland was widely seen as the most likely alternative to Ms. Kagan and the one most likely to win easy confirmation. Well respected on both sides of the aisle, he had a number of conservatives publicly calling him the best they could hope for from a Democratic president. Senator Orrin G. Hatch of Utah, a Republican member of the Judiciary Committee, privately made clear to the president that he considered Judge Garland a good choice, according to people briefed on their conversations.

But Mr. Obama ultimately opted to save Judge Garland for when he faces a more hostile Senate and needs a nominee with more Republican support. Democrats expect to lose seats in this fall’s election, so if another Supreme Court seat comes open next year and Mr. Obama has a substantially thinner margin in the Senate than he has today, Judge Garland would be an obvious choice.

As for Ms. Kagan, strategists on both sides anticipate a fight over her confirmation but not necessarily an all-out war. The White House hopes the Senate Judiciary Committee can hold hearings before July 4, but some Congressional aides were skeptical. Either way, Democrats want Ms. Kagan confirmed by the August recess so she can join the court for the start of its new term in October.

A New Yorker who grew up in Manhattan, Ms. Kagan earned degrees from Princeton, Oxford and Harvard Law School, worked briefly in private practice, clerked for Justice Thurgood Marshall, served as a Senate staff member and worked as a White House lawyer and domestic policy aide under President Bill Clinton. She was nominated for an appeals court judgeship in 1999, but the Senate never voted on her nomination.

She has been a trailblazer along the way, not only as the first woman to run Harvard Law School but also as the first woman to serve as solicitor general. Her inexperience as a judge...
makes her a rarity in modern times, but until the 1970s many Supreme Court justices came from outside the judiciary, including senators, governors, cabinet secretaries and even a former president.

If the Senate confirms Ms. Kagan, who is Jewish, the Supreme Court for the first time will have no Protestant members. In that case, the court would be composed of six justices who are Catholic and three who are Jewish. It also would mean that every member of the court had studied law at Harvard or Yale.

Like her former boss, Justice Marshall, who was the last solicitor general to go directly to the Supreme Court, Ms. Kagan may be forced to recuse herself during her early time on the bench because of her participation in a number of cases coming before the justices. Tom Goldstein, publisher of ScotusBlog, a Web site that follows the court, estimated that she would have to sit out on 13 to 15 matters. Mr. Whelan argued that it would be significantly more than that.