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What About Elena Kagan?

By MER Editors

Any nominee to the Supreme Court deserves an honest public hearing. But President Obama's high-court nominee, Elena Kagan, boasts a meager paper trail, making it difficult to evaluate her fitness for the highest court in the land.

Excerpts from an editorial in *The Economist* tell us, “The nominee’s career has been marked by frenzied networking and few publicly expressed opinions. She is a pal of nearly every Democrat who counts. . . . met Mr. Obama when he was a humble law lecturer . . . is now his solicitor-general. . . . worked in Bill Clinton’s White House and briefly for then-Senator Joe Biden. . . . clerked for Justice Thurgood Marshall. . . . and Larry Summers, then the boss of Harvard, made her dean of its law school. . . . All these bigwigs think Ms. Kagan is hot stuff” (“Cracking the Kagan Code,” May 13, 2010).

However, there are signs of extreme ideological leftism, suggesting Kagan is not the moderate her supporters claim she is.

Those who follow the news are aware by now that when she led Harvard Law School, Ms. Kagan barred military recruiters from campus in protest of the military’s “Don’t ask, don’t tell” ban on openly gay soldiers. This revelation has angered folks in Middle America, and even those who think the ban on gays in uniform is unjust are offended that the dean of a prestigious law school would actively discourage its students from serving their country.

Even the liberal Peter Beinart (former editor, *New Republic*) wrote, “*barring the military from campus is a bit like barring the president or even the flag. It’s more than a statement of criticism; it’s a statement of national estrangement.*” Ms. Kagan claims she was only enforcing a long-standing anti-discrimination policy, that the recruiting ban was not absolute and that she loves the military, really. Although she described the gay ban as “a moral injustice of the first order,” she backed down when the university’s federal funding was threatened.

Kagan has carefully avoided revelations of her judicial philosophy. Prior to becoming solicitor general of the United States in 2009, she stated that she had never tried a case all the way to a decision or verdict. She has never served as a judge at any level. Throughout her long academic career, she has written only three law review articles, a few short essays and two brief book reviews.

However, based on Ms. Kagan’s record as a Harvard academic, law clerk, and lawyer in the Obama administration, a picture of her judicial philosophy has begun to emerge by bits and pieces: During her days at Princeton, Kagan wrote a column expressing her bitter disappointment at Ronald Reagan’s election, and stating her hope that “*a new, revitalized, perhaps more leftist left will once again come to the fore.*”

In 1993, she expressed her opinion that the Supreme Court should see its primary mission as “*show[ing] a special solicitude for the despised and disadvantaged.*”

She strongly opposed the federal Defense of Marriage Act, which passed the Senate overwhelmingly, with support even from liberals such as Joe Biden. Ms. Kagan has stated that DOMA is discriminatory and that the Obama administration supports its repeal.

While serving in the Clinton White House, Ms. Kagan was deeply involved in deliberations that stopped legal action against eco-terrorists who blocked logging operations in Oregon. Senators have good reason to question Kagan about her obstructionist actions in that case.

Kagan has publicly criticized a Supreme Court decision that prohibited recipients of federal funds from counseling on or referring women for abortions.

On the matter of First Amendment rights, Ms. Kagan has written, “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

Being relatively young, Ms. Kagan has the potential opportunity to influence Supreme Court decisions for decades to come. An editorial in *The Economist* states, “Sooner or later, the court will hear a challenge to Mr. Obama’s

health reform. The constitution empowers Congress to “regulate commerce . . . among the several states.” Many conservatives think it a stretch to say this means the federal government can force people to buy health insurance, especially when some state governments object. Mr. Obama would hardly pick a Supreme Court justice who deemed his greatest domestic accomplishment unconstitutional, but outsiders can only guess how Ms. Kagan would interpret the commerce clause more generally. Since many of the powers the federal government has assumed since the 1930s rest on an expansive definition of interstate commerce, this matters” (“Cracking the Kagan Code,” May 13, 2010). Members of the Senate should take a very skeptical approach in evaluating this nominee. One wag commented, “Once she has a job for life on the court, she will reveal what she really thinks.” Reminds us of Nancy Pelosi’s now-famous assurance that “once the [healthcare bill] is passed, we’ll find out what’s in it.”

Sources:

National Review Online, Tony Blankley, May 19, 2010

The Economist, Jacob Sullum, May 14, 2010

The Weekly Standard, Michael Goldfarb, May 8, 2009

Washington Examiner, Byron York, May 12, 2010