



Examining Elena Kagan's Political Philosophy

Her Record Suggests a Liberal Political Lawyer with Activist Judicial Sympathies

During the Bush Administration, many Democrats argued that a judicial nominee's personal political ideology should play a prominent role in the Senate's determination of whether or not the nominee should be confirmed.¹ While the proposition that a nominee should be disqualified based simply on their private, personal views is contestable, in the case of Ms. Kagan, her political background and policy views may be relevant, for two key reasons.

First, she has no judicial experience and virtually no litigation experience on which the Senate can judge her suitability for the bench. Rather, a significant part of her public career has been spent as a political and legal advisor to presidents. The Senate, by necessity, must assess the record that a particular nominee brings to the table, and her career as a political advisor and policy advocate are a large part of her record. Second, while private political views *per se* may not be relevant, the way in which they are expressed and implemented can provide insight into a nominee's ability to be impartial as a judge. They may also indicate, in some cases, the nominee's understanding of the proper role of the Supreme Court in the American system.

The review of Ms. Kagan's record to date suggests a consistently left-liberal world view and a comfort with the judiciary imposing those values.

From her formative years, Ms. Kagan has embraced strongly liberal views. She has been quoted as saying, "Where I grew up -- on Manhattan's Upper West Side -- nobody ever admitted to voting for Republicans."² She said that in her youth in Manhattan, the politicians were "real Democrats -- not the closet Republicans that one sees so often these days but men and women committed to liberal principles and motivated by the ideal of an affirmative and compassionate government."³

As she continued her education at elite institutions such as Princeton and Oxford, Ms. Kagan's views remained consistent with those motivations. In 1980, writing for her college newspaper, she rued the election of Ronald Reagan and Republican Senators, calling them "Moral Majority-backed ... avengers of 'innocent life' and the B-1 bomber." She hoped that "the next few years will be marked by American disillusionment with conservative programs and solutions, and that a new, revitalized, perhaps *more* leftist left will once again come to the fore."⁴

Ms. Kagan capped of her college and graduate degrees with major papers lamenting the limited success of left-wing movements in America. At Princeton, she wrote a thesis on the decline of the socialist movement in America.⁵ She called the story of socialism's decline "sad but also chastening ... for those who, more than a half a century after socialism's decline, still wish to change America."⁶ Liberal academics have judged the piece "a judicious account of [American socialism's] self-destruction -- with the hope that the left might learn from past mistakes."⁷ A conservative historian agreed, saying

that the thesis “does reveal an individual who, like the socialists and unionists she was writing about, also wanted to ‘change America.’”⁸ In the paper’s acknowledgments, Ms. Kagan thanked a relative, whose ‘involvement in radical causes,’ she wrote, ‘led me to explore the history of American radicalism in the hope of clarifying my own political ideas.’”⁹

In her graduate thesis at Oxford,¹⁰ Ms. Kagan wrote sympathetically of the activist Warren Court that, in her words, “Time and time again ... asserted its right to do no less than lead the nation.”¹¹ She also expressed regret that the Court’s opinions were not structured strongly enough to entrench the changes the Court tried to impose on America.

Ms. Kagan dedicated much of her career to working for liberal Democrats in partisan staff positions. She worked as a staff member for the Michael Dukakis presidential campaign in 1988, as Special Counsel to Senate Judiciary Committee Democrats, and as a domestic policy aide to President Clinton. According to her, “most of the time I spent in the White House, I did not serve as an attorney; I was instead a policy adviser.”¹²

It is no surprise, then, that leading Democrats have stated that they know her beliefs to fall on the left hand side of the spectrum. Vice President Biden’s chief of staff, Ron Klain, stated, “Elena is clearly a legal progressive ... I think Elena is someone who comes from the progressive side of the spectrum.”¹³ Former White House Counsel Greg Craig, when pushed for information on Ms. Kagan’s legal views, said simply, “She is largely a progressive in the mold of Obama himself.”¹⁴

In addition to embracing a liberal agenda, Ms. Kagan has associated herself with prominent judicial activists who believe that judges have the power to impose their own views on the law.

After law school, she clerked first for progressive activist, and former liberal Congressman, Abner Mikva on the D.C. Circuit and then for prominent liberal Justice Thurgood Marshall on the U.S. Supreme Court. Indeed, as a clerk for Justice Marshall, Ms. Kagan often based recommendations upon her personal view of the advisability of the public policy result from a ruling, rather than on a straightforward analysis of the law.¹⁵ Confirming that she shares their expansive view of a judge’s power in society, Ms. Kagan has gone so far as citing Israeli chief justice Aharon Barak as her “judicial hero,” adding that “He is the judge or Justice in my lifetime whom, I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice.”¹⁶ Barak is widely regarded as one of the most activist judges in the world.¹⁷

In short, Ms. Kagan has spent much of her career working in politics and advocating liberal causes. What we know about her views suggests that she believes courts should play a leading role in pushing a liberal agenda. While there is nothing inappropriate or disqualifying about expressing liberal views, no one should be confirmed to the Supreme Court who would misuse the power granted to them to advance their own policy preferences. As a prerequisite to confirmation, Ms. Kagan must demonstrate that she will be bound by the law as written and apply it even-handedly to all who come before her, and will not try to “lead the nation”—as she approvingly said of the activist Warren Court—in a direction the law does not support.

¹ Judiciary Committee Democrats even held a hearing, “The Judicial Nomination and Confirmation Process: Should Ideology Matter.” Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts. June 26, 2001. Republican nominees were opposed on frankly political-ideological grounds. E.g., in the case of then-Alabama Attorney General William Pryor, nominee to the Eleventh Circuit, Senator Schumer said “his beliefs are so well known, so deeply held, that it is very hard to believe, very hard to believe that they are not going to deeply influence the way he” judges. Confirmation Hearing on the Nomination of William H. Pryor, June 11, 2003.

² “A Climb Marked by Confidence and Canniness,” Sheryl Gay Stolberg, Katherine Q. Seelye, and Lisa Foderaro, *The New York Times*, May 10, 2010. <http://www.nytimes.com/2010/05/10/us/politics/10kagan.html?pagewanted=all>

³ *Id.*

⁴ “*Fear and Loathing in Brooklyn*,” Elena Kagan, *The Daily Princetonian*, November 10, 1980.

<http://www.dailyprincetonian.com/2010/05/03/26082/>

⁵ “To the Final Conflict: Socialism in New York City, 1900-1933,” Elena Kagan, Princeton University, April 15, 1981.

<http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PrincetonThesis.pdf>

⁶ *Id.* at pp.129-30

⁷ “Elena Kagan Could Have been a Superb Historian,” David Greenberg and Tony Michels, *Slate*, May 21, 2010.

⁸ “On Elena Kagan’s Senior Thesis: Sound Anti-Communist Labor History,” Ron Radosh, *Pajamas Media*, May 20, 2010

⁹ *Id.* and “To the Final Conflict: Socialism in New York City, 1900-1933,” Elena Kagan, Princeton University, April 15, 1981.

¹⁰ “The Development and Erosion of the American Exclusionary Rule,” Elena Kagan, Oxford University, June 27, 1983, <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-OxfordThesis.pdf>

¹¹ *Id.* at p. 41.

¹² West Point Evening Lecture, Elena Kagan, October 17, 2007.

¹³ “White House Tries, Sort of, to Calm Liberal Doubts about Kagan,” Mike Madden, *Salon*, May, 10, 2010.

http://www.salon.com/news/politics/war_room/2010/05/10/white_house_calls_elena_kagan_progressive

¹⁴ *This Week*, ABC News, May 16, 2010.

¹⁵ “Documents Show Kagan’s Liberal Opinion on Social Issues,” Jan Crawford, CBS News, June 3, 2010.

http://www.cbsnews.com/8301-504564_162-20006769-504564.html

¹⁶ Elena Kagan introduction of Aharon Barak, Harvard Law Record, September 28, 2006, video available at <http://www.nationalreview.com/bench-memos/56132/more-kagan-s-judicial-hero-aharon-barak/ed-whelan>

¹⁷ See, e.g., “Enlightened Despot,” by Richard Posner, *The New Republic*, April 23, 2007.